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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

PACIFIC FAR EAST LINE, INC., *Petitioner*

v.

THE GOVERNMENT OF GUAM, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pacific Far East Line, Inc., ("PFEL") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above case July 11, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 138) *sub nom. Government of Guam* v. *Federal Maritime Commission,* is printed in Appendix B hereto, *infra,* p. 33a, and is not yet reported. Its opinion on a prior con-

sideration of this litigation, printed in Appendix B hereto, *infra*, p. 15a, is reported at 329 F. 2d 251. The related Federal Maritime Commission reports, *sub nom.* General Increases in Rates — Pacific-Atlantic-Guam Trade, printed in Appendix B hereto, *infra*, pp. 5a, 26a, are reported in 7 F.M.C. 423 and 8 F.M.C. 498.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1966. R. 149; p. 43a, *infra*. The jurisdiction of this Court is invoked under 5 U.S.C. § 1040, and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Has the government of Guam standing as *parens patriae* to maintain an action for review of a Federal Maritime Commission order in a general revenue proceeding approving increased rates of ocean common carriers between the United States and Guam?

2. Did the Commission err in determining the working capital allowable for inclusion in the carrier's rate base in conformity with the formula evolved by it over a period of years and utilized therefor in all the domestic offshore trades?

STATUTES INVOLVED

The statutory provisions involved are sections 1 and 18(a) of the Shipping Act, 1916, 39 Stat. 728 and 735, 46 U.S.C. §§ 801 and 816(a); sections 3-5 of the Intercoastal Shipping Act, 1933, 47 Stat. 1426, 52 Stat. 964, 53 Stat. 1182, 46 U.S.C. §§ 845-45b; and sections 4 and 9(a) of the Review Act of 1950, 64 Stat. 1130 and 1131, 5 U.S.C. §§ 1034 and 1039(a). In relevant part they are printed in Appendix A, *infra*, p. 1a.

STATEMENT

In 1960 following a period of severe losses in the U. S. Pacific Coast-Guam trade, PFEL published two general increases in rates. Upon protest by importing interests in Guam these and like increases by American President Lines, Ltd., were suspended by the Commission's predecessor and investigated.

During the investigation the respondent government of Guam intervened in the administrative proceeding. The government of Guam exists by virtue of the Organic Act of Guam, 64 Stat. 384, as amended, 73 Stat. 588, 48 U.S.C. § 1421a, which declares Guam an unincorporated territory and provides that its government's relations with the Federal Government shall be under the head of such civilian department or agency as the President may direct; the President has appointed the Secretary of the Interior. Exec. Order No. 10077, 14 Fed. Reg. 5533 (1949); Exec. Order No. 10137, 15 Fed. Reg. 4241 (1950). Respondent's asserted interest in the investigation was in obtaining favorable rates for the inhabitants of Guam; it claimed no proprietary interest as a user of ocean transportation or otherwise.

The Commission found the increases just, reasonable and lawful; *infra*, p. 13a. Upon petition by respondent the court of appeals reviewed the Commission's order. The court rejected PFEL's jurisdictional contentions that respondent lacks standing to maintain the action for review because (a) it has no interest other than its asserted interest in the level of rates paid by its inhabitants, of which the Commission is the guardian and (b) even the inhabitants have insufficient interest in the Commission's general revenue order, as distinguished from an order up-

holding individual rates or borne by them, to afford them standing; *infra,* pp. 16a-17a. On the merits, the court affirmed the Commission's order in part. It remanded the proceeding, however, directing the Commission to explain why the formula used for computing working capital in all the other domestic offshore trades was appropriate and had been used for computing the working capital to be included in PFEL's rate base; *infra,* p. 25a.

The Commission responded with a report explaining why the formula is appropriate and was applied to PFEL's service in the Guam trade. R. 13-16; *infra,* pp. 29a-32a. As it was using the fair return on fair value method of judging the reasonableness of the increased rates, it had to determine a rate base, including among other elements all or a portion of the working capital invested in the carrier's business. It did so by limiting the allowable working capital to the sum required to pay the expenses of one round voyage per vessel in the Guam service. The round-voyage formula, the Commission pointed out, had been uniformly required by it in all cases under its so-called domestic offshore rate regulatory jurisdiction since 1957, and in its judgment the formula had provided a realistic approximation of the amounts reasonably needed by carriers for current expenses, including a buffer fund for recurrent but unpredictable events that increase outlays or cut off revenues. It affirmed its prior approval of the general increases. R. 16; *infra,* p. 32a.

Respondent again sought review. The Court of Appeals ignored PFEL's renewed contentions as to Guam's lack of standing and the nonreviewability of a general revenue order. On the merits it again held the Commission did not make findings sufficient to per-

mit the court to ascertain whether use of the working capital formula was proper in this case. Its opinion notes four alleged deficiencies in the Commission's findings: (1) lack of rationale for allowing working capital for a buffer against accidents, strikes, and other unpredictable events, the court being "inclined to think that . . . accidents would be met by proceeds from insurance . . . [a]nd . . . the burdens of strikes . . . by temporary borrowing;" (2) lack of figures as to PFEL's investment in working capital; (3) uncertainty as to the Commission's "basic concept" of working capital; (4) the absence of an explanation of a difference between the hearing examiner's computation in applying the round-voyage formula and the Commission's. Rejecting without discussion the view of the Ninth Circuit in *Alaska Steamship Co.* v. *FMC,* 344 F. 2d 810 (9th Cir. 1965), that the formula may be used without such findings, the court remanded the proceeding a second time, instructing the Commission to make findings of fact as to the amounts, sources, and uses or potential uses of PFEL's working capital. R. 148; *infra,* p. 43a.

REASONS FOR GRANTING THE WRIT

1. The decision below, overturning the Commission's use of the round-voyage expense formula for measuring working capital allowable in the rate base, is in conflict with that of the Ninth Circuit in *Alaska Steamship Co.* v. *FMC,* 344 F. 2d 810 (9th Cir. 1965), *infra,* p. 44a ff., which upheld the Commission's use of that formula. The question of the appropriateness of the formula and of the kind of findings necessary to support its use is of continuing importance in the Commission's administration of the Intercoastal Shipping

Act, 1933, which confers rate regulatory jurisdiction in the offshore domestic trades (Alaska, Hawaii, Puerto Rico, Guam). And the court below fell into such plain error in substituting its judgment for that of the Commission, on a matter committed to the expert discretion of the latter, that reversal would be warranted even in the absence of the square (though unacknowledged) conflict between circuits.

a. In both the present case and the *Alaska Steamship* case, the Commission was faced with the question of the amount of the working capital allowable as an element of the rate base. In both cases the Commission applied so-called Limitation (4) of the Maritime Administration's General Order No. 31, which measures working capital by the average expense of one round trip for each vessel employed in the trade (pp. 34a, 66a, *infra*). The court below holds that the Commission's use of the round-voyage formula is improper unless supported by findings as to the amounts and sources of PFEL's working capital and the uses to which it is or may be put. The Ninth Circuit, on the other hand, held that such findings are unnecessary because the Commission's expertise and its uniform use of the formula in all general revenue cases in the domestic offshore trades satisfy what might otherwise be a need for such findings; the Ninth Circuit said (pp. 65a, 68a, *infra;* 344 F. 2d at 823, 824-25):

> But while the financial and operating data of a carrier is subject to factual proof, the determination of its prospective working capital needs necessarily brings into play judgment factors lying in the realm of opinion.
>
> * * *
>
> There are no specific findings or conclusions as to why a computation based on one round-trip voyage

expense of each vessel would produce an adequate working capital figure taking into account the factors mentioned.

But the Commission was entitled to, and did, take official notice of its past decisions in which the same formula was applied, including the 1963 case involving the overall operations of Alaska Steam. General Increases in Alaskan Rates and Charges, 7 F.M.C. 563, at 582 (1963). Such notice carried with it the reasons relied upon in the past cases concerning the appropriateness of using this formula.

Moreover, while the court below characterized as a mere "argumentative dissertation" the Commission's findings that PFEL needs working capital sufficient not only to meet a time lag between the incurring of ordinary expenses and the normal receipt of revenue but also to be ready "for vessel accidents, vessel layups, strikes, declines in traffic, and delays in adjustments of rates which are necessary to meet increased costs," (*infra,* pp. 35a, 36a) the Ninth Circuit on the other hand approved similar findings by the Commission as supporting the use of the formula as to Alaska Steamship Company (*infra,* p. 68a, 344 F. 2d at 825 n. 20):

> The allowance for working capital must also take into account cash requirements during other periods when revenues do not cover costs such as costs resulting from periods of vessel lay-up due to accidents, periods of increased vessel operating costs prior to the effective date of increased rates, and periods of strike.

The conflict is, therefore, plain.

b. The question of the propriety of the round-voyage expense formula is of continuing importance in the exercise of the Commission's rate regulatory powers.

The question has arisen in ten general revenue cases decided by the Commission since 1957 and is pending in two cases. If the view of the Ninth Circuit is upheld, the Commission will be permitted to rely on the formula in the absence of an explicit showing, based on facts, as to why it produces unreasonable results in a particular case. If, on the other hand, the view of the court below is upheld, it will be necessary in every case to make detailed findings as to the prospective uses to which each dollar of working capital is to be put. The administrative utility of the formula approach is enormous. In recognition of its utility the Commission has not only adopted the formula in its reported cases but also embodied it in its General Order No. 11, 29 Fed. Reg. 7721 (1964); 46 C.F.R. Part 512 (1965), which is a rule governing the reporting of financial data by all carriers in the off-shore domestic trades; the reports are used by the Commission in deciding whether to suspend proposed rate changes.

Moreover, three of the four domestic off-shore trades entail operations between the Pacific Coast and Alaska, Hawaii and Guam—all in the Ninth Circuit. Under the Review Act of 1950, *infra*, pp. 3a-4a, suits to review Commission action affecting those trades may be initiated either in the Ninth Circuit or the District of Columbia Circuit. Where working capital is a significant issue the party initiating the review obviously will choose to proceed in one or the other, depending on whether it is espousing or assailing the round voyage expense formula. Such forum shopping has been condemned by this Court,[1] and the writ should issue to obviate the occasion for it.

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[1] Van Dusen v. Barrack, 376 U.S. 612, 636 (1964); Wells v. Simonds Abrasive Co., 345 U.S. 514, 522 (1953) (Jackson, J., dissenting); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

c. At the last term this Court reversed the court below for having substituted its judgment for that of the Maritime Commission. *Consolo* v. *FMC*, 383 U.S. 607 (1966). The repeated remand of this case upon the ostensible ground of insufficient findings is no more, petitioner submits, than an attempt to circumvent the established limits upon the reviewing court's substitution of its judgment for that of the agency.[2]

In the necessarily inexact science of judging the reasonableness of rates whether to use a formula and, if so, its precise terms, are questions on which the courts are not warranted in rejecting the Commission's choice unless it plainly contravenes the statutory scheme of regulation. *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 589 (1945). By insisting on findings as to the use to which each dollar of working capital will be put the Court effectively precludes the formula approach. The requirement for detailed findings nullifies the convenience and utility of the formula. Also, should the results reached by a dollar-by-dollar enumeration of the carrier's working capital requirements diverge from those produced by the formula, it is readily apparent that the reviewing court would treat the detailed findings as more reliable than the formula results.

Further, much of the opinion below amounts to a barely disguised expression of disagreement with findings of the Commission, based upon substantial evidence, on questions of pure fact. Thus the Commission's findings that the carrier requires working

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[2] Cf. Justice Black's observation that "[h]ypercritical exactions as to findings can provide a handy but an almost invisible glideway enabling courts to pass 'from the narrow confines of law into the more spacious domain of policy.'" SEC v. Chenery Corp., 318 U.S. 80, 99 (1943) (dissenting opinion).

capital as a cushion against accidents, layups, strikes, and other happenings unpredictable as to time but certain of the occurrence, are purely factual. But the court characterized them as "argumentative dissertation" and proceeded to substitute its own argumentative dissertation to the effect that accidents should be provided for by insurance and strikes by borrowing.[3]

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[3] Not only does this amount to a substitution of the court's judgment for the agency's as to matters of fact, but also the court is clearly mistaken as to these matters. It is readily apparent that, whether or not the carrier provides insurance against accidents, there is a lag between the occurrence of the accident and the collection of the insurance claim during which funds are needed to resume normal operation, and in the case of strikes, whether working capital is borrowed or obtained from equity investors, it is nonetheless allowable in the rate base. See, *e.g.*, Bronx Gas & Elec. Co. v. PSC, P.U.R. 1923A 255, 282-83 (Sup. Ct. N.Y. Co. 1922), *aff'd*, 208 App. Div. 780, 203 N.Y. Supp. 922 (1st Dep't 1924); New York & Queens Gas Co. v. Prendergast, 1 F.2d 351, 364 (S.D.N.Y. 1924); New York & Richmond Gas Co. v. Prendergast, 10 F.2d 167, 177 (E.D.N.Y. 1925); Lincoln Gas & E. L. Co. v. Lincoln, 182 Fed. 926, 928 (C.C.D. Neb. 1909). The remaining deficiencies purportedly found by the Court in the Commission's findings are trival. The court complains of lack of figures as to PFEL's investment in working capital; but such figures were immaterial because it was undisputed that PFEL had a larger working capital than that allowed by the Commission under its formula, and the only question raised by respondent was whether the limitation imposed on the sum allowable should be replaced by a more restrictive limitation. The court's professed uncertainty as to the Commission's "basic concept" of working capital is in substance reiteration of its objection to allowing a buffer fund for accidents and strikes; and its objection to the Commission's finding as to the dollar amount produced by the formula is a matter of detail not open on judicial review, respondent not having suggested that the Commission's arithmetic is unsupported by the evidence.

We cannot refrain from adding that while the court below may not believe that the Fourteenth Amendment enacted Mr. Herbert Spencer's SOCIAL STATICS (Holmes, J., dissenting, in *Lochner* v. *New York*, 198 U.S. 45, 75 (1905)), it apparently does believe that the Intercoastal Shipping Act, 1933, enacted Barnes's ECONOMICS OF PUBLIC UTILITY REGULATION (1942) (see p. 36a, *infra*).

These aspects of the lower court's opinion manifest an all but open disregard for the rule against substituting its judgment for that of the agency on matters within the area of administrative expertise. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951); *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536 (1946); *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942); *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 139-40 (1939).

2. The case also presents the question of the standing of the government of Guam to petition for review of a general revenue order of a federal agency, where the sole interest asserted by Guam is as *parens patriae* of its inhabitants, whose general welfare it believes would be advanced by favorable steamship rates between the island and the mainland.

a. Questions of standing are inevitably of importance to this Court because whether a party before a federal court has standing involves questions of judicial power under Article III of the Constitution, which limits that power to the deciding of actual "Cases" or "Controversies."[4] It is a datum that federal courts lack power to entertain suits by a state as *parens patriae* to protect its citizens in their relations with the federal government. *Massachusetts* v. *Mellon*, 262 U.S. 447, 485 (1923); *Florida* v. *Mellon*, 272 U.S. 12 (1927); *cf. Wisconsin* v. *FPC*, 373 U.S. 294, 304 (1963).

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[4] "[T]he requirements of standing should be strict, lest the standards of 'case or controversy' in Article III of the Constitution become blurred." Griswold v. Connecticut, 381 U.S. 479, 481 (1965); see Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurther, J., concurring); Perkins v. Lukens Steel Co., 310 U.S. 113, 132 (1940).

This case presents the same obstacle as to a territory. The issue of a territory's standing as *parens patriae* was posed in *Secretary of Agriculture* v. *Central Roig Ref. Co.*, 338 U.S. 604 (1950), where the Court recognized that "Puerto Rico can have no better standing . . . than if it were a full-fledged State. . . . Whatever rights Puerto Rico has as a polity, . . : the Island is not a State."[5] It did not decide the question of the Commonwealth's standing, however, because other parties before the Court had standing to raise the real issues presented in the case.

Moreover, since under the Organic Act Guam's relations with the federal government, presumably including the Maritime Commission, are under the supervision of the Secretary of the Interior, respondent's standing involves the question whether the Secretary may seek review of an order of another agency charged specifically with jurisdiction over the subject matter. This question, too, has been mooted but not answered by the Court. In *United States ex rel. Chapman* v. *FPC*, 345 U.S. 153 (1953), the holding that the petitioners had standing was not supported by an opinion because no ground of decision commanded the acquiescence of a majority of the Court. The *Chapman* case leaves unsettled whether a majority were of the view that the Secretary had standing, for there were two petitioners and the Court's opinion is open to the interpretation that only the combined views

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[5] In the present case the court below relied upon its prior decision in Commonwealth of Puerto Rico v. FMC, 288 F.2d 419 (D.C. Cir. 1961), *infra*, p. 17a, which squarely involved the question left open in the Central Roig case.

of two minorities, one supporting standing for each petitioner, enabled the Court to reach the merits.[6]

The questions left unanswered in the *Central Roig* and *Chapman* cases call for a definitive answer by this Court. As stated, they are of constitutional dignity, affecting the judicial power of the United States; the Court has previously deemed them worthy of review, only to be precluded by their difficulty and delicacy from settling them; and they recur constantly in federal administrative law.

b. The view of the court below as to standing is erroneous; and it is in conflict, not only with *Massachusetts* v. *Mellon* and *Florida* v. *Mellon,* but also with the settled doctrine of the three-judge district courts. *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (E.D. Va. 1935); *Koppers Co.* v. *United States,* 132 F. Supp. 159 (W.D. Pa. 1935); *Florida Citrus Comm'n* v. *United States,* 144 F. Supp. 517 (N.D. Fla. 1956), *aff'd,* 352 U.S. 1021 (1957).

Many cases hold that a state, as *parens patriae,* lacks standing to institute judicial proceedings to protect the rights of its citizens. They are citizens of the United States, and the Commission, not the State or Commonwealth, stands in the relation of *parens patriae* to them. *Louisiana* v. *Texas,* 176 U.S. 1 (1900); *Oklahoma* v. *Atchison T. & S. F. Ry.,* 220 U.S. 277 (1911); *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923); *Florida* v. *Mel-*

[6] Moreover, unlike respondent here the Secretary asserted a specific statutory interest, involving the sale of electricity, in addition to his general interest in the subject-matter. The opinion can be read as meaning that in the absence of that specific interest a majority would have agreed with the Fourth Circuit (191 F.2d 796) that he lacked standing.

lon, 272 U.S. (1927); *Oklahoma* ex rel. *Johnson* v. *Cook,* 304 U.S. 387 (1938); *Massachusetts* v. *Missouri,* 308 U.S. 1 (1939); *Jones* ex rel. *Louisiana* v. *Bowles,* 322 U.S. 707 (1944).

Oklahoma v. *Atchison, T. & S. F. Ry., supra,* involved the lawfulness, under federal statute, of the railroad's rates. In holding that the State lacked standing to raise the question in the interest of its citizens, the Supreme Court said (220 U.S. at 286):

> "If, after Oklahoma became a state, the company still charged the Kansas rates on local business in Oklahoma, and if those rates would have been illegal under any state regulations, or were, in themselves, unreasonable and purely arbitrary, a controversy, in the constitutional sense, would have arisen between each shipper and the company * * *. But, plainly, the *state,* in its corporate capacity, would have no such interest in a controversy of that kind as would entitle it to vindicate and enforce the rights of a particular shipper or shippers, and, incidentally, of all shippers, by an original suit brought in its own name, in this court, to restrain the company from applying the Kansas rates, as such, to shippers generally in the local business of Oklahoma." [Emphasis in original.]

In *Massachusetts* v. *Mellon, supra,* the Court held (262 U.S. at 485-486):

> "We come next to consider whether the suit may be maintained by the State as the representative of its citizens. To this the answer is not doubtful. * * * It cannot be conceded that a State, as *parens patriae,* may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri* v. *Illi-*

> *nois,* 180 U.S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."

Since the States have no standing, *a fortiori* Guam has none.

The court below purported to distinguish *Massachusetts* and *Florida* on the ground that they "dealt with the [State's] capacity to sue as a plaintiff in the federal courts." *Infra,* p. 16a. The petitioner in a review proceeding, however, is essentially a plaintiff. The Review Act of 1950 parallels, as to Federal Maritime Commission orders, the statutory three-judge court procedure applicable in respect of Interstate Commerce Commission orders.[7] The moving party in the three-judge court proceeding is a plaintiff, and the petitioner in a review proceeding has the same character notwithstanding the difference in designation—petitioner rather than plaintiff. The relief sought and obtainable by a successful litigant under both procedures is an injunction against the agency order. The court's purported distinction of *Massachusetts* and *Florida* is not well made.

In any event, respondents can have no standing to protect the interests of its citizens who themselves are without standing. The citizens of Guam—even those who make use of PFEL's transportation services—are

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[7] Other, of course, than for enforcement of reparation orders. Consolo v. FMC, 383 U.S. 607 (1966).

without standing because the proceeding before the Commission was a general revenue case, not a rate case. Shippers and receivers have standing to challenge the reasonableness only of the rate for the particular commodities which they ship or receive; they may not challenge in court the agency's determinations as to rates of commodities shipped or received by others. *Alexander Sprunt & Son* v. *United States,* 281 U.S. 249 (1930); *Edward Hines Trustees* v. *United States,* 262 U.S. 143 (1923); *Brimstone R. & Canal Co.* v. *United States,* 276 U.S. 104 (1928).[8]

For that reason, shippers and receivers are precluded from challenging orders authorizing general increases in the rates for all traffic; they are limited to their administrative remedy by way of complaint to the Commission under section 22 of the Shipping Act, 1916 (39 Stat. 736, 46 U.S.C. § 821) against the individual rates on their traffic. This is settled by the *Algoma, Koppers,* and *Florida Citrus Commission* cases, cited above. Their reasoning is exemplified by the following statement of the three-judge court in the *Koppers* case (132 F. Supp. at 162, 163):

> The Commission represents the public. While it is proper and customary for shippers interested to participate in hearings, there exists no provision for notice to them. They are not bound by the order entered and the tariffs filed. If the rates made

[8] *Alexander Sprunt & Son* v. *United States, supra,* is illustrative. There a shipper who had benefitted from a differential between export rates and local delivery rates was held to lack standing to seek review of a rate order eliminating the differential. He could not complain merely because the order was economically injurious; he was required to show that the rate was unlawful as to his traffic. Similarly, in the *Edward Hines* case a shipper was held to lack standing to obtain review of an order affecting the rates of other shippers.

by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, Sections 13 and 15 afford ample remedy. To permit shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission. The attempt of the court to remove some alleged unjust discrimination might result in creating more. United States v. Merchants' & Manufacturers' Traffic Association, 1916, 242 U.S. 178, 37 S. Ct. 24, 61 L. Ed. 233.

Sections 13 and 15 of the Act speak with clarity, and explicitly specify the procedure which complainants must pursue before the Commission in order to seek redress of grievances.

The plaintiff has mistaken its remedy in the statutory scheme of railroad rate making. Its contention is that the Commission, without sufficient evidence or proper findings of fact, has determined or fixed particular rates for the plaintiff's particular traffic. But this misconceives what the Commission has actually done. It was not dealing finally with particular rates for particular traffic, but permitting increased rates for selected commodities, by a general order affecting all railroads in the country.

If the increased rates as applied to the plaintiff's particular situation can be shown to be unjust and unreasonable, its remedy is clearly by proceedings under Sections 13 and 15 of the Act for individual relief, and for reparation orders under the Act of Congress. 49 U.S.C.A. § 16(1); Brimstone R. & Canal Co. v. United States, 1928, 276 U.S. 104, 48 S. Ct. 282, 72 L. Ed. 487; Alexander Sprunt & Son v. United States, 1930, 281 U.S. 249, 50 S. Ct. 315, 74 L. Ed. 832; Eagle Cotton Oil Co. v. Southern R. Co., 5 Cir., 51 F. 2d 443, certiorari denied, 1931, 284 U.S. 675, 52 S. Ct. 130, 76 L. Ed. 571; Algoma Coal & Coke Co. v. United

States, D.C.E.D. Va. 1935, 11 F. Supp. 487. The plaintiff must proceed to exhaust its administrative remedies by challenging the rates filed by the railroads pursuant to the authorization granted it by the Commission in the ex parte [general rate increase] proceeding.

Section 22 of the Shipping Act, 1916,[9] provides the same remedy by way of complaint as section 13 of the Interstate Commerce Act mentioned by the Court in the *Koppers* case.

CONCLUSION

For the reasons stated, the foregoing Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel:

KOMINERS & FORT

October 10, 1966

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[9] "SEC. 22. That any person may file with the board [Commission] a sworn complaint setting forth any violation of this Act by a common carrier by water or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

"The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act."

APPENDIX A

Pertinent Provisions of the Shipping Act, 1916

SEC. 1. . . .

* * * * *

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

* * * * *

SEC. 18(a) That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

* * * * *

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carriers is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

* * * * *

Pertinent Provisions of the Intercoastal Shipping Act, 1933

SEC. 3. Whenever there shall be filed with the board any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the board shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice: *Provided, however,* That there shall be no suspension of a tariff schedule or service which extends to additional ports, actual service at rates of said carrier for similar service already in effect at the nearest port of call to said additional port.

Pending such hearing and the decision thereon the board, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than four months beyond the time when it would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the board may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period. At any hearing under this paragraph the burden of proof

to show that the rate, fare, charge, classification, regulation, or practice is just and reasonable shall be upon the carrier or carriers. The board shall give preference to the hearing and decision of such questions and decide the same as speedily as possible.

SEC. 4. Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice demanded, charged, collected, or observed by any carrier subject to the provisions of this Act is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation or practice: *Provided*, That the minimum-rate provision of this section shall not apply to common carriers on the Great Lakes.

SEC. 5. The provisions of this Act are extended and shall apply to every common carrier by water in interstate commerce, as defined in section 1 of the Shipping Act, 1916.

* * * * *

Pertinent Provisions of the Review Act of 1950 :

SEC. 4. Any party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk

shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

* * * * *

SEC. 9. (a) Upon the filing and service of a petition to review, the court of appeals shall have jurisdiction of the proceeding. The court of appeals in which the record on review is filed, on such filing, shall have jurisdiction to vacate stay orders or interlocutory injunctions theretofore granted by any court, and shall have exclusive jurisdiction to make and enter, upon the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

* * * * *

APPENDIX B

FEDERAL MARITIME COMMISSION

No. 901

GENERAL INCREASES IN RATES—
PACIFIC-ATLANTIC/GUAM TRADE

Decided October 23, 1962.

[7 F.M.C. 423]

General increases in rates between United States and Guam, Mariana Islands, Midway Island, Wake Island, Ebeye (Kwajalein Atoll), and Eniwetok, for the carriage of commercial cargo, including cement, found to be lawful and just and reasonable.

• • • • •

Report of the Commission

THOS. E. STAKEM, *Chairman;* JOHN HARLLEE, *Vice Chairman;* ASHTON C. BARRETT, *Commissioner;* JOHN S. PATTERSON, *Commissioner.*

BY THE COMMISSION:

This proceeding is an investigation into the lawfulness of two rate increases proposed by Pacific Far East Lines (PFEL) and American President Lines (APL) for the carriage of freight between the United States and Guam and several surrounding islands.

The tariffs under investigation are PFEL Guam Tariff No. 2 (F.M.B.-F. No. 2), APL Pacific-Guam Tariff No. 5 (F.M.B.-F. No. 9), and APL Atlantic-Guam Tariff No. 3 (F.M.B.-F. No. 8), which published a general increase of about 10 percent in rates between ports in the United

States and Guam and which, after suspension, became effective on April 30, 1960, and PFEL Tariff No. 3 (F.M.B.-F. No. 3), APL Pacific-Guam Tariff No. 6 (F.M.B.-F. No. 11), and APL Atlantic-Guam Tariff No. 4 (F.M.B.-F. No. 10), which published a general increase of 20 percent in rates between ports in the United States and Guam and which, after suspension, became effective on January 27, 1961.

The Government of Guam, Guam Associates, the Harbor Commission of the City of San Diego and the General Services Administration intervened.

Following hearings the Examiner in an initial decision found the increases of 10% and 20% to be just and reasonable.

Exceptions were filed and oral argument held.

Respondents APL and PFEL are the only common carriers providing service between the United States and Guam and the only United States flag service between Guam and foreign countries.

During the first six months of 1960 PFEL transported approximately 87 percent of the revenue tons of non-military freight shipped from all ports in the United States to Guam, and 96 percent of such traffic from West Coast ports to Guam. In view of PFEL's dominant position in the trade, the Examiner concluded that the lawfulness of the general increases under investigation should be determined in the light of traffic, operations, revenues and net profits or losses of PFEL in the trade. We agree.

Prior to June 30, 1960, PFEL utilized three AP-3 ships and two chartered C-3 ships in the Guam trade. Two sailings a month were made from California, and one call each month was made in the Pacific Northwest and at Honolulu.

On outbound voyages, as required, the AP-3 ships would continue on to Japan, Formosa, and the Philippines, and

return via Guam. The C-3 ships would continue on to Japan and return directly to the West Coast. On June 30, 1960, PFEL discontinued its charter of the C-3 ships and replaced them with three C-2 ships chartered from a wholly-owned subsidiary. Sailings to Guam were increased to three each month. Calls in the Pacific Northwest and at Honolulu were continued at one each month and service beyond Guam was substantially as described above.

PFEL's operations include both subsidized and unsubsidized voyages, and the unsubsidized voyages are further divided into domestic operations to and from Guam and foreign operations. It is therefore necessary to separate such operations in order to determine PFEL's financial experience solely in the Guam trade. Since the unsubsidized operations are conducted with assigned ships, and separate voyage accounts are kept covering such operations, ship operating expenses and depreciation incurred relative to such ships will be directly apportioned to that service. The income and expense of other shipping operations will be divided between the subsidized and unsubsidized services in the ratio of terminated voyage expenses of the unsubsidized operations to terminated voyage expenses of all voyages terminating in the accounting period. The same ratio will be used to apportion overhead expenses (less agency fees, commissions, and brokerage earned), and depreciation expense, other than ships. Overhead expenses should be allocated on the basis of voyage expense. They should follow the expense to which they relate. *Pacific Coast/Hawaii and Atlantic Gulf/Hawaii General Increases in Rates,* 7 F.M.C. 260 (1962).

In the same manner overhead expenses in the domestic operation, sometimes called the "domestic leg," will be distributed between commercial and military cargo. Other expenses in the domestic operation, except the items which can be directly assigned by weight or cost, will be dis-

tributed on the basis of a ton-mile revenue prorate; that is, the relation that the number of ton-miles of commercial cargo (including cement) carried bears to the total ton-miles of cargo carried in the domestic trade.

The freight carried in the Guam trade falls into three categories; namely, commercial, military household goods, and military freight. The commercial cargo may be broken down into two categories—general commodities and cement in bulk. Hearing Counsel and interveners contend that revenues from military household goods, military freight, and bulk cement, and expenses assignable to the carriage of such traffic, should be excluded in determining the lawfulness of the rates under investigation.

Military freight and military household goods are carried for the United States Government at special contract rates. Neither the private commercial shippers nor the people of Guam should pay any part of PFEL's expense for such service or for any return on the property PFEL devoted to such carriage. Accordingly, such service will be excluded in determining the reasonableness of rates under consideration.

PFEL's tariffs contain a rate for the carriage of cement in bulk, which rate is available to all commercial shippers. The fact that it is carried in bulk and for only one shipper is not controlling in this proceeding. The controlling fact is that it is common carriage subject to the tariff rates and available to any private shipper. While the record shows that PFEL did not charge the proper tariff rate during 1959 and part of 1960, this does not warrant our excluding it from our considerations in this proceeding. An investigation into the lawfulness of rates is not the proper proceeding for an adjudication of alleged violations of law. We find that the transportation of bulk cement is a part of the service covered by the rates under investigation and the revenues and expenses therefrom will be

considered in testing the reasonableness of the proposed rates.

The Examiner in his initial decision projected a net profit, after Federal income tax, of $134,480 for the year 1960. In arriving at that profit, the Examiner allocated expenses between commercial cargo, military household goods, and military cargo in the manner set forth above. He found that military household goods and military cargo accounted for 47 percent of the revenue tons carried in the Guam service in the first six months of 1960.

The following table sets forth the Examiner's projection of PFEL's net profit of $134,480 for the year 1960:

Revenue	$5,990,534
Voyage Expense	4,905,584
	1,084,950
Other Shipping Operations Net	30,740
	1,054,210
Administrative and General Expenses	602,876
Depreciation	171,168
	774,044
Profit before Income Tax	280,166
Federal Income Tax	145,686
Net Profit	$ 134,480

Guam argues that the Examiner erred (1) in adjusting PFEL's projected voyage expenses to reflect the substitution of three C-2's for two C-3's by giving effect to increased operating expenses twice, and (2) in failing to exclude rentals paid for whaleback pallets, and (3) in failing to reduce the expense of other shipping operations by savings resulting from the reduction of the number of vans and containers under lease.

The Examiner eliminated charter hire on a ton-mile prorate applicable to commercial cargo and substituted operating expense for the three C-2 ships after allocation, and added estimated increases in expenses primarily for wages and fuel. The method adopted by the Examiner was correct and does not result in giving effect to increased operating expenses twice.

With regard to the whaleback pallets, and the reduction of vans and containers under lease, the evidence shows that PFEL reduced its net expenses of other shipping operations by $58,000 for the year 1960, which it claims includes an estimate of the savings resulting from reductions in the number of leased vans, containers, and whaleback pallets. The Examiner found net expenses of other shipping operations for year 1960 to be $30,740. The evidence of record supports the Examiner's finding. The exceptions are disallowed.

We agree that the record supports the Examiner's projections of expenses except as to administrative and general expenses. We find $570,290 to be the just and reasonable amount to be allocated to the carriage of commercial cargo for administrative and general expense in the Guam service. Such amount reflects the deletion of the legal expenses in connection with PFEL's subsidized operations, and reflects savings resulting from reductions in force effected in 1959.

After such adjustment we find that PFEL's net profit after Federal income taxes for the projected year 1960 for the carriage of commercial cargo in the Guam trade under the proposed increases to be $150,121.

PFEL excepts to the Examiner's failure to find that operating ratios should be considered as a measure of the reasonableness of the rates under investigation.

On the record before us, we find that the fair return on the fair value standard should be used in determining the

reasonableness of rates in the Guam trade and that the prudent investment standard should be used to arrive at the fair value of the property devoted to the Guam trade. *Atlantic-Gulf Puerto Rico General Increase in Rates and Charges,* 7 F.M.C. 87 (1962). Our reasons are adequately set forth in that case and no purpose would be served by restating them here. It is therefore unnecessary to discuss transactions involving the acquisition and disposition of one of the AP's and the three chartered C-2's owned by PFEL's subsidiary and used by PFEL in the trade.

Six ships are used by PFEL in the Guam trade. Two are owned by PFEL and four as stated above by a wholly owned subsidiary. For the purposes of this proceeding all six ships will be considered as though they were owned by PFEL.

In addition to ships other items properly included in the rate base of a domestic water carrier are the values of other floating equipment devoted in whole or in part to the service, other assets and working capital. The principal item claimed by PFEL in the category of other floating equipment is the barge *Adak Isle.* This barge was purchased by PFEL in 1956, and used until late 1958 to speed the unloading of cement from ships used in the Guam service. In 1958 the superstructure and all gear, such as pumping equipment used to unload cement, were removed, and the barge has not been used since. In view of the present condition of the *Adak Isle,* there is no apparent use which can be made of it by PFEL in the Guam service. The barge cannot be considered as property used or useful in providing service to shippers, and therefore will not be included as a part of the rate base.

PFEL claims that a house located in Guam, which is owned by a PFEL subsidiary, Pacific Micronesian Lines, and occupied by PFEL's representative, should be included in the rate base. Such house is being used in the regulated trade, since PFEL's local representative aids in the ad-

ministration of that trade, and its depreciated value properly allocated will be included in the rate base for this reason. A second house located on Guam, which is owned by PFEL and leased to a shipper, is not used and useful in the trade, but is for the benefit of others, and its value will be excluded.

In *Atlantic Gulf/Puerto Rico, supra,* we allowed as working capital an amount equal to one round voyage expense of each ship in the service. Applying the same measure here and allocating as between commercial cargo, including bulk cement and military cargo on the basis of the relation of the voyage expenses (63 percent to commercial and 37 percent to military), we find the fair and reasonable allowance for working capital to be $1,118,524. Since working capital is the fund from which voyage expenses are paid, such expenses are the most accurate measure of the employment in working capital.

No allowance will be included in the rate base for "claims pending" or "other deferred charges and prepaid expenses". Working capital based on average voyage expense itself provides for these items.

On the basis of the foregoing, we find the fair value of the property devoted to the carriage of commercial cargo in the Guam trade to be as follows:

Ships	$1,137,274
Other Property	79,542
Working Capital	1,118,524
	$2,335,340

The projected net annual profit of $150,121 is approximately 6.42 percent of the rate base.

PFEL contends that a rate of return of 12.5 percent of its weighted average cost of capital would be lawful. Guam argues that PFEL should be limited to a rate of return equal to 6 percent of its invested capital.

We need not in this proceeding determine what the maximum rate of return is in this trade. A rate of return of 6.4 percent on property valued on the basis of the prudent investment standard is not unreasonable.

Exceptions not discussed here, nor reflected in our findings, have been considered and are denied as unsupported by reliable and probative evidence or are irrelevant to this decision.

It is found and concluded that PFEL's Tariff Nos. 2 and 3 applicable to general commodities and to cement in bulk transported between United States Pacific ports and ports in Guam, Mariana Islands, Midway Island and Wake Island, under investigation herein, are lawful, just and reasonable.

It is further found and concluded that APL's Pacific-Guam Tariff No. 5 and No. 6, APL's Atlantic-Guam Tariff Nos. 3 and 4 applicable to general commodities transported between United States Atlantic and United States Pacific and Hawaiian ports and ports in Guam, Mariana Islands, Midway Island, Wake Island, Ebeye (Kwajalein Atoll) and Eniwetok Atoll under investigation herein are lawful, just and reasonable.

An order discontinuing this investigation shall be entered as to both respondents.

Order

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

No. 901

GENERAL INCREASES IN RATES—
PACIFIC-ATLANTIC/GUAM TRADE

Full investigation of the matters and things involved in this proceeding having been had, and the Commission on October 23, 1962, having made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rates, charges, tariffs, and regulations herein under investigation are just and reasonable and lawful;

It is ordered, That this proceeding be, and it hereby is, discontinued.

By the Commission, October 23, 1962.

(Sgd) THOMAS LISI
Secretary

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 17488

THE GOVERNMENT OF GUAM, *Petitioner,*

v.

FEDERAL MARITIME COMMISSION
and United States of America, *Respondents,*

Pacific Far East Line, Inc., American President Lines, Ltd.,
Intervenors.

Argued Oct. 24, 1963

Decided Jan. 23, 1964

[329 F. 2d 251]

* * * * *

Before PRETTYMAN, Senior Circuit Judge, and WILBUR K. MILLER and MCGOWAN, Circuit Judges.

PRETTYMAN, Senior Circuit Judge.

This is a petition to review an order of the Federal Maritime Commission approving two rate increases for the transportation of commodities by water between the United States and Guam. The petitioner is the Government of Guam. The transportation companies involved are the Pacific Far East Line, Inc., and the American President Lines, Ltd. They are intervenors in this court.

Approximately half the population of Guam consists of United States military and civil service personnel and their dependents. The principal activities on the Island are related to the military establishment. Guam is directly dependent upon ocean transportation from the United States for virtually all goods consumed on the Island.

The two companies here involved are the only common carriers serving the Island.

A threshold question must be considered. Pacific Far East says the Government of Guam has no standing to petition for review in this proceeding, because it is not a "party aggrieved" within the meaning of the statute.[1]

The Government of Guam was admitted as a party to the proceeding before the Commission. In its petition for review it alleges that the carriers here involved are the only ocean transportation carriers providing freight service between the United States and Guam, and that "The lawfulness of freight rates and charges is of vital concern to the Government and people of Guam, the economics of whose very existence is predicated on the ocean freight supply line to the United States." It alleges that it is aggrieved by the Commission's order. Pacific Far East says Guam's only basis for standing is its capacity as *parens patriae,* and points to cases such as our State of Minnesota ex rel. Lord v. Benson[2] and the Supreme Court cases of Massachusetts v. Mellon,[3] Florida v. Mellon,[4] and similar cases. But the *Benson* case dealt with the problem of *parens patriae* in respect to an action of the Federal Government itself, *i. e.,* a milk regulation, and the Supreme Court cases dealt with the capacity to sue as a plaintiff in the federal courts. We think they are not applicable here. It has long been recognized that in utility cases involving private operators a state or municipal government may be a proper party and, if adversely affected as such by an order, is aggrieved. Thus, in People

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[1] Sec. 4, Judicial Review Act of 1950, 64 Stat. 1130, 5 U.S.C. § 1034.

[2] 107 U.S. App. D.C. 106, 274 F. 2d 764 (D.C. Cir. 1960).

[3] 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923).

[4] 273 U.S. 12, 47 S. Ct. 265, 71 L. Ed. 511 (1927).

of State of California v. Federal Power Comm'n,[5] the allegation of California was that it was aggrieved "in that your petitioners are charged with the duty of protecting the interests of the several million gas consumers in the State of California, the vast majority of whom are served by the aforementioned California public utilities." And in Commonwealth of Puerto Rico v. Federal Maritime Board[6] we recognized the government of Puerto Rico as a proper petitioner for review in a case precisely like the one presently at bar, procedurally speaking. In that case (*Puerto Rico*) we specifically denied a motion to dismiss grounded upon lack of capacity in the petitioner for review. The doctrine of the matter is reflected in the cases cited in the margin.[7] We regard the point as foreclosed.

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[5] 111 U.S. App. D.C. 226, 296 F. 2d 348 (D.C. Cir. 1961), rev'd on other grounds, 369 U.S. 482, 82 S. Ct. 901, 8 L. Ed. 2d 54 (1962).

[6] 110 U.S. App. D.C. 17, 288 F. 2d 419 (D.C. Cir. 1961).

[7] Georgia v. Pennsylvania R. Co., 324 U.S. 439, 450-51, 65 S. Ct. 716, 89 L. Ed. 1051 (1945); Pennsylvania v. West Virginia, 262 U.S. 553, 591-592, 43 S. Ct. 658, 67 L. Ed. 1117 (1923); New York v. United States, 331 U.S. 284, 67 S. Ct. 1207, 91 L. Ed. 1492 (1947); State of Wisconsin v. Federal Power Comm'n, 112 U.S. App. D.C. 369, 303 F. 2d 380 (D.C. Cir. 1961), aff'd, 373 U.S. 294, 83 S. Ct. 1266, 10 L. Ed. 2d 357 (1963) (California and its Public Utilities Commission, petitioners in one of the three cases here involved, obtained review by alleging only the interests of citizens); Michigan Consolidated Gas Co. v. Federal Power Comm'n, 108 U.S. App. D.C. 409, 283 F. 2d 204 (D.C. Cir.), cert. denied, Panhandle Eastern Pipe Line Co. v. Michigan Consol. Gas. Co., 364 U.S. 913, 81 S. Ct. 276, 5 L. Ed. 2d 227 (1960) (in petitions here the State of Wisconsin and the City of Detroit alleged only the interests of their citizens); City of Pittsburgh v. Federal Power Comm'n, 99 U.S. App. D.C. 113, 237 F. 2d 741 (D.C. Cir. 1956); City of Detroit, Michigan v. Federal Power Comm'n, 97 U.S. App. D.C. 260, 230 F. 2d 810 (D.C. Cir. 1955), cert. denied, 352 U.S. 829, 77 S. Ct. 34, 1 L. Ed. 2d 48 (1956); State of Wisconsin v. Federal Power Comm'n, 92 U.S. App. D.C. 284, 205 F. 2d 706 (D.C. Cir. 1953), aff'd sub nom. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035 (1954),

We come then to the case on the merits. Petitioner presents, principally, four questions.

1. For rate-base purposes the Commission, following the prudent-investment theory, which in this case was the net book value, used December 31, 1959, as the valuation date of property committed to the trade.[8] Guam says that this was error and contends that the valuation date should be June 30, 1960. Guam premises its position on the fact that the Commission, in computing revenues and expenses for a test year, used the actual figures[9] for the six-month period January to June, 1960, and then multiplied by two. This calculation gave it a test year of 1960, which was a projection based upon actual figures for the first six months.

In the first place, this point is of "negligible importance. Its presence or absence would not make the difference between confiscation and a fair return."[10] The disputed amount is $72,212. Using the projected net annual profit of $150,121, an adjustment of $72,000 in the rate base would affect the rate of return by one-fifth of one per cent.

In the second place, the selection of a method or formula for computing permissible rates is for the Commission, unless its action is arbitrary.[11] A method similar to the one followed here has been used in other cases, both by

[8] Some minor items, totaling $8,005, were valued as of June 30, 1960.

[9] Since Pacific Far East transported by far the greater portion of non-military freight, it was treated as the dominant carrier and its figures were used for test purposes.

[10] Dayton Power & Light Co. v. Public Utilities Comm'n, 292 U.S. 290, 310, 54 S. Ct. 647, 78 L. Ed. 1267 (1934).

[11] Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944), and the many cases in which that decision has been followed. See, e. g., Mississippi River Fuel Corp. v. Federal Power Comm'n, 82 U.S. App. D.C. 208, 163 F. 2d 433 (D.C. Cir. 1947).

the Federal Maritime Commission and by the Interstate Commerce Commission.[12] It is a rational method for test-year purposes in a projection of future rates. We cannot say its use here was arbitrary.

2. In addition to military goods and freight and other commercial cargo, the transportation companies carried in the test period a certain amount of bulk cement. Prior to the effectiveness of the tariffs here in dispute, this cement was carried under a special contract, and the carriage was at rates less than the published tariffs. In its projected rate base, revenues and expenses, the Commission included figures attributable to the carriage of this bulk cement, along with the figures for other commodities moving under the tariffs under consideration. Guam says that bulk cement should have been segregated and treated as non-tariff freight.

The tariffs under consideration contained a rate applicable to bulk cement, and the Commission found that this cement has been moving under that rate since July 1, 1960. Thus, as a matter of fact, this freight has been a tariff freight under the schedules involved in this proceeding.

Guam argues that the transportation of bulk cement was a "one-time movement not to be repeated in the future which moved at all only because of the special rate granted in a clear departure from the tariff." We think, however, that the Commission's finding is adequately supported by the record. Two of Pacific Far East's witnesses testified that at the time of the hearing cement was being moved under the tariff rate, and nothing in the record directly contradicts this testimony.

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[12] See General Increases in Alaskan Rates and Charges, 7 F.M.C. 563 (1963); Increased Freight Rates, 270 I.C.C. 403 (1947); Increased Railway Rates, Fares and Charges, 264 I.C.C. 695 (1946). Cf. Atlantic and Gulf-Puerto Rico General Increases in Rates and Charges, 7 F.M.C. 87, 101 (1963).

Guam says that bulk cement is a non-compensatory item, in that amounts paid for its carriage are not sufficient to pay the expenses of that carriage when those expenses are calculated on a proportionate basis with other items of freight. But it frequently happens that, when general revenues and expenses are computed on an overall basis, applicable to the entire business of a carrier, some items, if separated, appear as carried at non-compensatory rates. This result ensues from the compelling obligation of the carrier to render public service, and it has been approved.[13] The doctrine is applicable here. These rates apply to ocean transportation, and the fact is that when a vessel moves, the whole vessel moves; the carrier is not divisible into parts adjusted to the amount or character of freight being moved on a particular trip. Bulk cement is a "filler" cargo. It is accepted for carriage on a space-available basis. The handling is at the expense and risk of the shipper, and the only expense borne by the carrier is the added vessel time in port. Thus whatever revenue is derived in the carriage of this freight tends to reduce the charges necessarily made to other shippers. We think Guam's contention on this matter cannot be sustained.

3. The service of Pacific Far East is in part subsidized. In respect to certain general expenses direct allocations are impracticable. Therefore in respect to such expenses an allocation between subsidized and unsubsidized service had to be made upon some doctrinal basis. The Commission made this allocation on a voyage expense prorate. It said: "Overhead expenses should be allocated on the basis of voyage expense. They should follow the expense to which they relate." Guam says that such a prorate does not equitably allocate as between the two services. It

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[13] See B. & O. R. R. v. United States, 345 U.S. 146, 73 S. Ct. 592, 97 L. Ed. 912 (1953).

says that the effect of the method is to charge the unsubsidized trade with a substantial amount of the expenses actually due to the subsidized service. The Maritime Administration has a General Order (No. 31) which requires that, where direct allocations are impracticable, income and expenses shall be allocated between subsidized and unsubsidized operations on the basis that the operating and maintenance expenses separately bear to the total of such expenses.

The problem posed by a situation such as the one we have just outlined is not a simple one, nor is it susceptible of a scientifically precise answer. The Supreme Court had occasion to refer to the difficulty in the *Colorado Interstate Gas* case[14] and in New York v. United States.[15] Since allocation involves judgment and discretion, the method used here by the Commission has support in the General Order of the Maritime Administration to which we have referred, and a similar method has been used in other cases.[16]

It has long since been established, as we have already remarked, that the selection of methods and formulae for the computation of factors essential to rate fixing is for the Commission and not for the courts. However there is a judicial duty of review in these matters, and it is equally well established that the reviewing authority is entitled to know—indeed must know—the basic data and the whys

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[14] Colorado Interstate Gas Co. v. Federal Power Comm'n, 324 U.S. 581, 589, 65 S. Ct. 829, 89 L. Ed. 1206 (1945).

[15] 331 U.S. 284, 335, 67 S. Ct. 1207, 91 L. Ed. 1492 (1947).

[16] Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 7 F.M.C. 260, 288 (1962); Re Northern Nat. Gas Co., 95 P.U.R. (NS) 289, 308 (FPC 1958); Re Mississippi River Fuel Corp., 95 P.U.R. (NS) 435, 461-62 (FPC 1958); Re Shell Oil Co. of Canada, 31 P.U.R. 3d 503, 514 (Alberta Bd. of Pub. Util. Comm'rs 1959).

and wherefores of the Commission's conclusions.[17] We find this latter doctrine applicable to our disposition of this dispute concerning administrative overhead. It may well be that administrative overhead usually follows allocable expenses; but this is not always necessarily true, and, where it is not true, the truth, if ascertainable, must prevail.

Guam vigorously contends that the subsidized service involves a lesser proportion of directly allocable voyage expenses but a greater proportion of the administrative overhead. It says the record shows that voyage expenses in the subsidized service have been decreasing sharply, due largely to new and better equipment, while expenses in the unsubsidized service have remained constant; but the requirements of the subsidized operation consume an enormous part of the general administrative overhead, due to the accounting requiremnts of subsidies. Guam says that the combination of these two factors results, under the disputed prorate, in loading the unsubsidized service with a vast amount of overhead expense it does not in fact incur. This inequity is of so considerable an amount that the rate structure is distorted, Guam says.

Our difficulty in this situation is that the Commission made no findings on the point. It merely stated the abstract proposition that overhead expenses should "follow the expense to which they relate" and applied the voyage expense prorate without stating any facts against which we can test the accuracy of the result. Since the case must be remanded for another reason, the Commission should, and is now directed to, avail itself of that opportunity to state is findings and conclusions upon the problem posed by Guam on this item; that is, whether the application of

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[17] Colorado-Wyoming Gas Co. v. Federal Power Comm'n, 324 U.S. 626, 634, 65 S. Ct. 850, 89 L. Ed. 1235 (1945); South Carolina Generating Co. v. Federal Power Comm'n, 249 F. 2d 755, 763-764 (4th Cir. 1957), cert. denied, 356 U.S. 912, 78 S. Ct. 668, 2 L. Ed. 2d 585 (1958); Mississippi River Fuel Corp. v. Federal Power Comm'n, 82 U.S. App. D.C. 208, 163 F. 2d 433 (D.C. Cir. 1947).

the voyage expense prorate results, upon the facts of this particular case, in an inequitable allocation and a distorted resultant rate structure. If it did, the Commission must determine how a fair and equitable result can be reached. It will be so ordered.

4. A similar situation obtains in respect to the item of working capital included by the Commission in the rate base. A rate base computed at the value of property devoted to the service to which the rate pertains is often still short of the total amount of funds needed by the company in order to do business. A business concern must have funds for current operating purposes and to meet other imperative needs, especially until such time as revenues begin to come in. This is called "working capital". It is a proper rate-base item. Working capital has been variously defined, but for rate-making purposes the most generally adopted definition is that of Barnes, as follows:

> "Working capital, in the technical sense in which it is here employed, does not include the total liquid funds with which the business is conducted. It is not the property which the business *has*; that is, it is not the excess of current assets over current liabilities. Working capital, rather, is an allowance for the sum which the company *needs to supply from its own funds* for the purpose of enabling it to meet its current obligations as they arise and to operate economically and efficiently."[18]

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[18] Barnes, Economics of Public Utility Regulation 495 (1942). See Alabama-Tennessee Nat. Gas Co. v. Federal Power Comm'n, 203 F. 2d 494, 498 (3d Cir. 1953); Trunkline Gas Co. v. Federal Power Comm'n, 247 F. 2d 159, 165 (5th Cir. 1957); General Increases in Alaskan Rates and Charges, 5 F.M.B. 486, 499 (1958); Re Western Union Telegraph Co., 25 P.U.R. 3d 385, 421-28 (FCC 1958). See also Bauer, Public Utility Valuation 289-300 (1934); Clemens, Economics and Public Utilities 173 (1950); Stecher, The Determination of Working Capital in Railroads and Public Utilities, 39 Yale L.J. 927 (1930).

In the case at bar Guam says no working capital was necessary, since all shipping charges were prepaid and thus the carrier had funds sufficient to finance all operations and at a time in advance of the incurrence of the costs thereof. But we think this sweeping generality is not accurate. The Commission and the company show the need for some amount of working capital. However there is a real question as to what amount.

The Commission used a formula upon which it has relied at least since 1957.[19] It allowed as working capital an amount computed as the sum total of the voyage expense of one round trip for each vessel in the Guam service after allocation for the commercial cargo. This yielded a figure of considerable size—$1,118,524 in a total rate base of $2,335,340. An apparent incongruity comes immediately to notice. Working capital is rarely, if ever, so large a proportion of the funds committed to this type of enterprise.[20] And certainly the prepayment of shipping

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[19] See Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increase in Rates, 5 F.M.B. 347, 350, 355 (1957); General Increases in Alaskan Rates and Charges, 5 F.M.B. 486, 499-500 (1958); Atlantic & Gulf-Puerto Rico General Increases in Rates and Charges, 6 F.M.B. 14, 35-36 (1960), remanded Commonwealth of Puerto Rico v. Federal Maritime Bd., 110 U.S. App. D.C. 17, 288 F. 2d 419 (D.C. Cir. 1961), report on remand, 6 F.M.C. 87, 109 (1962). Arguments against the use of this formula were presented to this court in the *Puerto Rico* case, and, although our opinion did not mention the point, we did remand for failure of the Board to state "the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record".

[20] Here the working capital allowance was approximately 47 per cent of the total rate base. This is over twice the proportion of working capital to the rate base in a sampling of other recent maritime rate cases. See cases cited in note 19, *supra*.

charges is a factor tending to lessen working capital needs.[21]

The nub of the point here is that working capital is not a doctrinaire entry in the rate base; it is a realistic allowance—realistic in need and realistic in amount. Its inclusion in a rate base must bear a real relationship to the realities of the situation. The problems here are: For what purposes did *this* company need working capital, and how much did it need for those purposes?

Our difficulty here is much the same as it was in respect to the item last above-discussed. The Commission made no findings and stated no conclusions to support its reason for applying the formula used. It cited authority for and described the formula, and then justified its application by saying:

> "Since working capital is the fund from which voyage expenses are paid, such expenses are the most accurate measure of the employment of working capital."

We cannot tell from the data before us whether the amount thus included was or was not within the discretionary power of the Commission. The case must therefore be remanded in order that the Commission may make the findings and state the conclusions which resulted in the ultimate conclusion it reached on this point. It will be so ordered.

Affirmed in part and remanded in part.

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[21] Authorities agree that the need for working capital arises primarily from the time lag between the payment of expenses and the receipt of payments in respect to which the expenses were incurred. See Alabama-Tennessee Nat. Gas Co. v. Federal Power Comm'n, 203 F. 2d 494, 498 (3d Cir. 1953); City of Pittsburgh v. Pennsylvania Pub. Util. Comm'n, 370 Pa. 305, 88 A. 2d 59, 61-62 (1953); Los Angeles Gas & Electric Corp. v. Railroad Comm'n, 58 F. 2d 256, 262 (S.D. Cal. 1932); General Increases in Alaskan Rates and Charges, 5 F.M.B. 486, 499 (1958); Re South Carolina Gen. Co., 15 P.U.R. 3d 289, 305 (FPC 1956); Re Potomac Elec. Power Co., 55 P.U.R. (NS) 65, 81-82 (D.C. Pub. Util. Comm'n 1944); Clemens, Economics and Public Utilities 173 (1950).

FEDERAL MARITIME COMMISSION

Docket No. 901

GENERAL INCREASES IN RATES
PACIFIC-ATLANTIC/GUAM TRADE

Decided June 8, 1965

[8 F.M.C. 498]

Allocation of administrative and general expense and allowance for working capital made previously in this proceeding affirmed upon remand.

Report on Remand

BY THE COMMISSION: (JOHN HARLLEE, *Chairman;* ASHTON C. BARRETT AND JOHN S. PATTERSON, *Commissioners.*)**

On January 23, 1964, the United States Court of Appeals for the District of Columbia Circuit remanded this case to the Commission in order that the Commission might state its findings and conclusions on two issues. In all other respects, the Court of Appeals affirmed our previous Report and Order entered in this proceeding. The two issues remanded are (1) our allocation of administrative and general expense to the Guam trade, and (2) the inclusion of working capital as an item in the rate base. These issues will be discussed *seriatim.*

Administrative and General Expense

As the Court recognized, the absence of extensive time and motion studies indicating the precise amount of administrative effort devoted to the subsidized and un-

** Commissioners James V. Day and George H. Hearn did not participate.

subsidized services respectively, makes necessary the allocation of administrative and general expenses (overhead) "upon some doctrinal basis." The Commission, in arriving at this doctrinal basis, has selected the "voyage expense prorate," the same method used by the Maritime Administration, Department of Commerce,[1] in allocating administrative and general expense to the subsidized sector of the trade.

The voyage expense prorate allocates as administrative expense in the unsubsidized trade, an amount bearing the same ratio to total administrative expenses as the voyage expense for the unsubsidized trade bears to total voyage expenses. This method is based on the assumption that "since administrative and general expenses are a mixture of salaries and expenses that pertain to the overall management and operation of [the carrier], * * * their allocation should follow those expenses (i.e. vessel operating expenses) that management must control to profitably operate the business." *Alaska Steamship Company — General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska,* Docket Nos. 969 and 1067 (March 6, 1964).

We believe the voyage expense prorate, although lacking in absolute mathematical precision, to be the fairest of the "doctrinal bases" on which overhead expense may be allocated. It has been used by the Maritime Administration and by us in the past based on a long record of actual experience in the shipping industry, in which the relation of overhead expenses to operating expenses has been shown.

Guam contends, however, that the use of the voyage expense formula in this case fails to consider the additional burdens of accounting and other administrative activity borne by the subsidized service. The reasonableness of the voyage expense prorate is reinforced, however, when compared with other significant data. The allocation of 31.5 percent of overhead expense to the unsubsidized

[1] Maritime Administration General Order 31.

service bears a close relationship to the ratio of the number (12) of completed voyages in the unsubsidized service (32.4 percent) to the number (25) of completed voyages in the subsidized sector of Pacific Far East Line, Inc. (PFEL) operations (68.6 percent). That proportion of overhead is also closely comparable to the ratio of revenue in the unsubsidized trade (30 percent) to total revenue. There is no indication from the record that overhead expenses in the subsidized trade comprise more than 70 percent of the total.

The use of the voyage expense prorate is also amply justified by equitable considerations. As a subsidized carrier, PFEL, for subsidy accounting purposes, is required to compute overhead expense pursuant to General Order 31, using the voyage expense prorate. To require the use of another formula in this proceeding, producing a lower figure for overhead expense, would result in a failure to charge to any service part of PFEL's actually incurred overhead expenses. Because of the limitations which are imposed on PFEL's return in each of the services, the company would thus be precluded from recovering from its revenues the full expense incurred by it in serving the public.

It is significant that the Government of Guam, while condemning the voyage expense prorate as inadequate, fails to offer a reasonable alternative. Guam calls attention to a large increase in overhead allocated to the unsubsidized service in 1960 as compared with the amount so allocated in the year 1957, and claims that allowable administrative overhead "should exclude a revenue ton mile proration of the excessive overhead expense transferred to the unsubsidized service in 1960 in comparison with 1957." The Commission has used the year 1960 as the test year for revenues and expenses throughout this proceeding.[2] It

[2] Actual figures for the 6-month period January to June 1960 were multiplied by 2, in order to give a projection of revenues and expenses for the entire year.

would be unjustifiable to arbitrarily shift to 1957 as a test year for overhead expenses. Guam chooses this year because its use would produce the lowest allocation of overhead expenses of any year covered by the record. However, the year 1957 has no more to recommend it as a test year for overhead expenses than years following when more overhead was allocated to the unsubsidized service. Moreover, the 1957 allocation was based on a revenue prorate, not a voyage expense prorate as in the test year of 1960. The Commission has rejected that method of allocation in *Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii, General Increases in Rates,* 7 F.M.C. 260, 288 (1962):

> If revenues were used as a basis of allocating expenses, the increase in revenue resulting from a freight rate increase would result in an increased allocation of expenses. A rate increase might be used as the basis for justifying a further increase in rates.

The use of 1957 as a test year for overhead allocation cannot be supported by the record.

Working Capital

In past rate cases, we have used as an allowance for working capital in the rate base an amount equal to one round average voyage expense for each vessel in the trade. This formula was used in our prior Report in this case, and the Court of Appeals remanded because we failed to state any findings and conclusions as to why this formula was appropriate. The Court of Appeals was concerned with the fact that the allowance must be realistic in the light of the carrier's needs and it was also concerned in this particular case with the fact that the allowance of working capital constituted such a large percentage of the rate base (47 percent).

The need for working capital arises, as the Court of Appeals observed, because "a business concern must have

funds for current operating purposes and to meet other imperative needs, especially until such time as revenues begin to come in." This need for funds to meet current operating costs arises regardless of the amount of fixed assets held by a business. Thus, if two steamship companies are substantially identical in their operations, but one has made a substantial investment in new vessels and equipment, while the other is operating with obsolete, or substantially depreciated fixed assets, the working capital requirements of the second company, although similar in dollar amount to the first, would represent a greater proportion of its rate base. Actually its need for working capital could be considerably greater due to the age of its vessels, resulting in increased repair and maintenance costs.

PFEL's position is similar to that of the second company. Since its terminal facilities are leased, vessels and working capital make up over 95 percent of the total rate base. The six vessels used by PFEL in the trade have an average age of approximately 17 years from the date of construction, are near the end of their depreciable life, and hence have a low and diminishing net book value. The low value of PFEL's few owned fixed assets, however, does not diminish PFEL's total requirements for a fund to meet current operating expenses even though that amount may be high in relation to the value of its assets.

Since working capital is the fund from which current operating costs must be met, a more meaningful comparison is the ratio working capital bears to those expenses, rather than to the total rate base. PFEL's allowable working capital under the round voyage formula is 19 percent of its annual cash operating expenses of $5,669,245 ($5,840,413 less $171,168 depreciation charges), as projected by the Commission. This compares favorably with ratios of working capital to operating expenses which have been allowed by the Interstate Commerce Commission. (See e.g., *Florida East Coast Ry.*, 84 I.C.C. 25, 32-33 (1924)

—17.5 percent; *Louisville & W.R. Co.*, 103 I.C.C. 252, 253 (1925)—31 percent; *Boston Terminal Co.*, 103 I.C.C. 707, 718 (1925)—29 percent.)

Guam contends that to the extent freight charges are prepaid PFEL is not required to supply working capital from its own funds. Guam looks upon working capital in terms of a fund used to meet a time lag between expenses incurred and revenue received. But working capital is more than this. It must sustain the carrier when emergencies or unforeseen events result in large outlays of cash not met by corresponding inflows of revenue. The carrier must be financially prepared for vessel accidents, vessel layups, strikes, declines in traffic, and delays in the adjustments of rates which are necessary to meet increased costs. During these periods when revenue may be cut off or curtailed, certain of the carrier's expenses continue, such as overhead, vessel insurance, maintenance and repairs, van and container, and other property rentals, principal and interest on mortgages.

Working capital to meet these unforeseen circumstances is not capable of measurement in terms of the carrier's actual experience. They are by nature speculative. That strikes occur with some frequency in the shipping industry and affect all trades, however, is not speculative. Although prepaid freight may to some extent meet a carrier's normal current operating expenses, the carrier must be allowed to sustain itself when the unforeseen causes these revenues to be cut off.

The practice of other regulatory agencies, namely the Federal Power Commission, the Interstate Commerce Commission, and the Civil Aeronautics Board, is in accord with this approach. Despite the fact that air fares and charges are prepaid, the CAB allows as working capital approximately 90 days of cash operating costs. The rules for railroad tariffs specify quite clearly that payment for freight must usually be made within 120 hours, but the

ICC allows approximately 16 days of cash operating needs as working capital. These allowances are clear recognition that working capital does more than provide funds to meet the "revenue lag."

The Commission's allowance of working capital, based on one round voyage expense for each ship in the trade is a realistic one. The operator is, of course, responsible for the expenses involved in the completion of a round voyage, the length and duration of which vary from trade to trade. These differences render the average voyage expense formula a more equitable formula than a time allowance, since it gives recognition to resulting increases in costs of the longer voyage.

Based on the foregoing, we adhere to our previous determination, and find PFEL's allowable working capital in the Guam trade to be $1,118,524, and allowable administrative and general expenses to be $570,290.

As our previous Report has in effect been affirmed by this decision, this proceeding is discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19574

THE GOVERNMENT OF GUAM, *Petitioner*

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA, *Respondents*

PACIFIC FAR EAST LINE, INC., *Intervenor*

On Petition for Review of Order of the
Federal Maritime Commission

Decided July 11, 1966

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Before PRETTYMAN and WILBUR K. MILLER, *Senior Circuit Judges*, and MCGOWAN, *Circuit Judge*.

PRETTYMAN, *Senior Circuit Judge*: This is a petition for judicial review of an order of the Maritime Commission relating to freight rates in ocean transportation to and from Guam. It is the second consideration of the case by this court. Upon the first petition we remanded to the Commission for further findings and explanation upon two problems.[1] One problem concerned the allocation of overhead administrative expenses between subsidized and unsubsidized commerce. The Commission had used a voyage-expense prorate for this purpose. We directed it to state findings and conclusions upon this matter and,

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[1] Government of Guam v. Federal Maritime Commission, 117 U.S. App. D.C. 296, 329 F. 2d 251 (1964).

specifically, to show whether this method resulted in an inequitable allocation and a distorted rate base in this case. We find the Commission's treatment of this item upon the remand to be satisfactory, and its order in that respect is affirmed.

The other problem was the determination of working capital for inclusion in the rate base. The examiner to whom the case was assigned reported the parties to be in agreement that working capital should be calculated in accordance with General Order 31, 46 C.F.R. § 286.3(a)(1).[2] He said that the carrier contended the computation should be in accordance with Limitation (4) of that General Order, whereas Public Counsel and the intervenors, who included the Government of Guam and the General Services Administration, contended that Limitation (3) should be applied. The examiner cited *Atlantic-Gulf/Puerto Rico General Rate Increases*,[3] in which the Maritime Board said that in determining working capital as an element of a rate base in a rate proceeding "we will limit the amount to that determined under Limitation 4 of General Order 31 and give no consideration to Limitation 3." The examiner said that ruling must be followed. He then used the figure shown by the carrier, being $940,384 allocated to the Guam commercial traffic. So far as we are advised he gave no further detail on the item.

General Order 31 is a complicated combination of accounting provisions, but in substance Limitation (3) provides that Adjusted Working Capital should include current assets less current liabilities, and Limitation (4) says that working capital as determined under (3) should be allowed to the extent of the Total Average Voyage Expenses.

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[2] This is a general order issued by the Maritime Administration in respect to subsidized operations, and relates to the determination of "recaptures" of subsidy payments.

[3] 6 F.M.B. 14, 36 (1960).

When the item came before the Commission it referred to *Atlantic-Gulf/Puerto Rico* and said that applying the same measure "we find the fair and reasonable allowance for working capital to be $1,118,524." Then it added, "Since working capital is the fund from which voyage expenses are paid, such expenses are the most accurate measure of the employment of working capital." In the tabulated finding of the fair value of property devoted to the Guam commercial traffic appears the item "Working Capital 1,118,524". No further explanation or comment was vouchsafed.

Of course working capital is not unequivocally "the fund from which voyage expenses are paid". Frequently, when revenue is received in advance of performance, or the payment of the expense is postponed until after the receipt of revenue, expenses are met from revenue; or they are met from borrowed funds, or from insurance receipts, or from reserves such as depreciation. So the generalization used by the Commission is of little value as a guidepost in a test of a computation. We are not now talking, of course, about the final compensation for expenses in a rate-making proceeding; they are a direct deduction from revenue to compute the return. We are talking about an available supply of funds from which to meet expenses in the actual practical payment thereof. This is the purpose and function of working capital.

We remanded "in order that the Commission may make the findings and state the conclusions which resulted in the ultimate conclusion it reached on this point." In response the Commission made no findings but instead supplied us with an argumentative dissertation in support of the rule it said it was following. In the course of that discussion the Commission said, *inter alia:*

> "Guam looks upon working capital in terms of a fund used to meet a time lag between expenses incurred and revenue received. But working capital is more than this. It must sustain the carrier when emer-

gencies or unforeseen events result in large outlays of cash not met by corresponding inflows of revenue. The carrier must be financially prepared for vessel accidents, vessel layups, strikes, declines in traffic, and delays in the adjustments of rates which are necessary to meet increased costs. During these periods when revenue may be cut off or curtailed, certain of the carrier's expenses continue, such as overhead, vessel insurance, maintenance and repairs, van and container, and other property rentals, principal and interest on mortgages."

The foregoing quoted passage leaves us with several difficulties. (1) We are not given any supporting rationale for the proposition that the item "working capital" in a rate base includes provisions for accidents, layups, strikes, declines in traffic, and delays in adjustments in rates. Without such assistance we would be inclined to think that losses incurred by reason of vessel accidents would be met by proceeds from insurance, the premiums on which are deductible as expenses in the profit-and-loss calculation. And we would think that the burdens of strikes are most frequently met by temporary borrowing. The point is that we are without material by means of which we can exercise the judicial duty resting upon us to test the validity of the Commission's ultimate conclusion against a vigorous attack by a responsible party. The brief filed on behalf of the Commission in the present proceeding is quite valueless, being merely a brief paraphrase of the Commission's opinion.

The definition of working capital in Barnes's *Economics of Public Utility Regulation* is: "Working capital, rather, is an allowance for the sum which the company *needs to supply from its own funds* for the purpose of enabling it to meet its *current obligations* as they arise and to operate economically and efficiently."[4] The words "cur-

[4] Barnes p. 495 (1942). (Emphasis on the words "current obligations" added.)

rent obligations" exclude nebulous or contingent considerations. They confine the function of this category of working capital to coverage of a definite, reasonably predictable lag or gap between the outlay of expenses and the payment by the customer of the charges for the services rendered.

The intervenor asserts that the prepayment of freight expenses affects only what it calls category (a) of working capital, or "cash to cover time lag between expenditures and revenues". It claims that there is another category which should be and has been considered by various agencies in setting working capital, *i.e.*, a cash buffer fund for contingencies. The cases cited in support of that assertion do not, when read individually, support the assertion. Intervenor argues, admitting that the support is not direct or in terms, that the reasonable extension or interpretation of the cited opinions dictates support of its asserted position. The cases do not authorize inclusion in working capital of such speculative sums. The mention of contingency is restricted by the opinions to unforeseen or unpredictable lag between expense and receipt of payment—a natural extension of the aforementioned lag factor.

> "Working capital is understood to include, usually, three parts: First, the investment in a stock of material and supplies; second, the cash necessary to pay the operating expenses incurred for common-carrier service prior to the time when the revenues from that service are available; and, third, a buffer fund of cash constantly on hand to cover amply the recurrent and fluctuating deficiencies in the inflow of revenue *applicable to payments falling due.*" (Emphasis added.)[5]

Clearly the Interstate Commerce Commission did not in the above-quoted opinion set a precedent for the inclusion

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[5] Blue Ridge Ry. Co., 97 I.C.C. 744, 759 (1925).

in the computation of working capital of any provision for such contingency factors as the intervenor suggests. It merely emphasized the contingency and the instability of the "lag" item. Had it intended to extend the proper elements of working capital, the limitation "applicable to payments falling due" would have no meaning.

The intervenor urges the term "buffer fund", which is used in several opinions in the public utility area.[6] It argues that various contingencies, such as strikes, vessel accidents, and even unexpected declines in traffic, justify a large working capital item. Such an allowance would in turn permit much higher rates on the mere possibility of such occurrences. That procedure would allow the utility to charge its customers just in case some unhappy contingency should befall the utility in its future operation. This argument was disposed of in *Northampton and Bath Railroad Company:*

> "Cash required to cover casual operating deficits due to the temporary falling off of traffic is not working capital, any more than is the steady supply of cash, as by a parent company, to cover a chronic operating deficit. Both are the result of adverse conditions of the business, which are part of the risks assumed by the enterprise and are not underwritten by the patrons."[7]

The very concept of working capital is of a buffer fund. It is properly used to buffer the utility during the normal expected period of lag between outlay of shipping expenses and receipt of payment thereof (a less compelling factor in this case, since much of this shipping expense was prepaid), and also to insulate or buffer the utility from possible unexpected lag due to the unpredictable nature

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[6] *E.g.*, Alaskan Rates, 2 U.S.M.C. 558 (1941); General Increases in Alaskan Rates and Charges, 7 F.M.C. 563 (1963).

[7] 149 I.C.C. 244, 269 (1928).

of such transactions. Further, the working capital item can properly provide for materials and supplies required for operation. However to compel the patrons to insure the company through high rates against loss from strikes, accidents, or traffic decline places too much of the risk of the enterprise on parties who do not stand to share in the financial success of the company. If the stockholders in this case have pledged a large sum to a contingency fund being held to insure the company from financial crises, and merely ask for a fair return on that money, we should have findings to that effect.

Intervenor has read the *Alaskan Rates* cases rather too enthusiastically for its own argument. The mention of the propriety of a buffer fund in those opinions was followed by a precise expression of the purpose of the fund, "to cover the fluctuating deficiencies in the receipt of cash from operating revenues necessary to meet maturing operating payments."[8] Intervenor interprets this language to refer to a wide range of causes for the decline in revenue of the carrier—strikes, accidents, and even simple decline in traffic,—whereas the language quite clearly restricts its coverage to deficiencies *in the receipt* of cash, that is, precisely, the lag between expense and payment, which both parties and the Commission agree is a proper element of the working capital figure.

(2) We are without facts or figures to show whether this carrier did indeed have working capital provisions in its financial structure and, if so, how much; or whether it included amounts for accidents, layups, strikes, declines in traffic, delays in rate adjustments, or any other contingencies, and, if so, how much for each. We are without any supporting factual data for any part of this allowance in the rate base. If a carrier kept on hand a large part of a million dollars in cash, or property easily and

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[8] 2 U.S.M.C. at 566.

quickly convertible into cash, for use in meeting fixed expenses in the event of a strike, instead of relying upon short-term borrowing for that contingency, the policy might be regarded by some as inept financing; but, if the investors in the carrier really supplied the funds for that purpose, they would probably be entitled to a fair return on its use, payable by the customers. The "if" in that situation would be the possibility that some regulatory agency would not deem the practice reasonably necessary and so would not allow the item in working capital in the rate base.

(3) We are not certain as to what is the Commission's basic concept of the working capital item in the rate base. This is not an expense item, and so the ratepayers do not supply this amount for use by the carrier in meeting certain expenses. This is a rate-base item. It means that the public says to the carrier, in effect, "If you are compelled by the exigencies of your operation to carry certain amounts of your own money readily available to meet expenses at times when you are having no revenue, we will pay you a fair return on those amounts, just as though you had them invested in property used in your business." Working capital is the carrier's own money. It is real, factual. It is not a theoretical assumption. Its inclusion in the rate base and the consequent return permitted upon it can no more be allowed in respect to a non-existent fund than could a non-existent boat be included in the rate base. But in the case now before us we are not given any findings by which we can ascertain what the facts are or determine whether they support the conclusion.

(4) We are given no explanation of the difference between the $940,384 which the examiner put in his table of values for the Rate Base in the Guam Commercial Traffic and the $1,118,524 found by the Commission and included in its fair value of property devoted to the

carriage of commercial cargo in the Guam trade. A total of $1,216,816 in ships and all other property devoted to the business and $1,118,524 of working capital required, although freight charges were usually and principally prepaid, is a combination of figures which incites inquiry. The exhibit (No. 121) in the record shows on the liability side as of June 30, 1960, unterminated voyage revenue of $455,289.65. And the Commission's reference to the rate of return earned by the carrier is of no weight upon this point, since the point concerns the rate base upon which the rate of return is computed. If the carrier earns $100,000 net and its rate base is $1,000,000, its rate of return is 10 per cent, but, if the rate base is $2,000,000, its rate of return figures out to be 5 per cent.

The carrier insists with vigor that ample evidence to support its claims as to working capital is in the record. If so, the Commission should make findings in respect to it. It is not our function to locate or to evaluate in the first instance evidence in a record before us.

We do not mean to hold that the Commission must make detailed factual findings in respect to every item involved in any of the many complicated transactions which it must consider in the performance of its duties; but, when a factual item is seriously disputed, and especially in the event of a remand from a reviewing court, findings in sufficient detail to support the ultimate conclusion of the agency against the attack must be made by the agency.

The Commission should also make findings which will permit us to ascertain whether the use of General Order 31 was proper in this case. That Order was issued by the Maritime Administration for the purpose of controlling the grant of subsidies. The working capital allowance for those purposes was the amount given the carrier by the Government in the form of a subsidy for the purpose of permitting it to carry on its business effectively

and economically. But working capital in a rate base, upon which customers must pay the utility a fair return, is a different concept. The basic idea of a rate base is of property devoted by investors to public service, for which the public (represented by customers) must pay fair compensation. As part of the rate base, working capital falls within that definition. It is property supplied by investors for the purpose of carrying on the business. Professor Barnes's *Economics of Public Utility Regulation* contains a clear and succinct discussion of the subject (pp. 495-496). It would seem that a principle applicable to the determination of the amount of a subsidy properly to be paid by the Government is also applicable to the determination of a rate base for rate-making, so long as the investors are supplying the amounts allowed. But an amount which *should* be allowed, as in a subsidy, cannot actually *be* allowed, as in a rate base, unless it exists. A witness for the carrier (Ross, R. 403) testified that "Generally, you do consider" working capital to be the difference between current assets and current liabilities. But that is Limitation (3) of General Order 31 and is specifically rejected by the Commission. An exhibit (Ex. No. 121) shows a calculation of this Limitation (3) for the commercial service as indicating the proper allowance for working capital to be $310,702.78.

A curious feature of General Order 31 in the context of this case is that Limitation (4) provides the extent to which working capital computed under Limitation (3) can be allowed. It says "Adjusted Working Capital as determined under Limitation (3) shall be allowed as capital employed to the extent of the Total Average Voyage Expenses employed in subsidized operations determined as follows: * * *." We have not been supplied with data by which we can ascertain the accuracy of the Commission's calculations in these circumstances. Clearly the Commission did not apply the average voyage expenses

(Limitation (4)) as a limitation upon the excess of current assets over current liabilities (Limitation (3)).

For all the foregoing considerations the case must be remanded again. The Commission must make findings of fact which justify conclusions which in turn support the ultimate conclusion reached by the Commission. This will require, *inter alia*, findings as to the facts of the working capital held or utilized by this carrier, the amount or amounts, the sources, the uses, or the potential uses indicated by the experience of this or other companies, and all other factual features of the operation which are material to show the validity of the Commission's conclusions.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Judgment

This case came on to be heard on the record from the Federal Maritime Commission, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the Federal Maritime Commission on review in this case is affirmed in part and remanded in part for further proceedings consistent with the opinion of this court.

Per Senior Circuit Judge Prettyman

Dated: July 11, 1966.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 19297.

ALASKA STEAMSHIP COMPANY, a corporation, and Northern Commercial Company, a corporation, d/b/a Northern Commercial Co. River Lines, *Petitioners,*

v.

FEDERAL MARITIME COMMISSION and United States of America, *Respondents,*

STATE OF ALASKA, *Intervenor.*

April 15, 1965.

Rehearing Denied May 21, 1965.

[344 F. 2d 810]

* * * * *

Before HAMLEY, MERRILL and DUNIWAY, Circuit Judges.

HAMLEY, Circuit Judge:

Alaska Steamship Company (Alaska Steam) and Northern Commercial Company (Northern Commercial) have petitioned for review of two orders of the Federal Maritime Commission entered in a rate investigation proceeding. The State of Alaska has intervened in support of the Commission orders.

The rate investigation was conducted in discharge of the Commission's functions and responsibilities under the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. § 801 et seq. (1958), and the Intercoastal Shipping Act, 1933, 47 Stat. 1425, as amended, 46 U.S.C. § 843 et seq. (1958). The review in this court was instituted pursuant to the Review Act of 1950, 64 Stat. 1129, 5 U.S.C. § 1031 et seq. (1958).

Alaska Steam is a carrier by water in the Alaska trade. The company serves all of the areas of the State of Alaska as a common carrier by water to and from the ports of Seattle and Tacoma, Washington, on the one hand, and various ports and places in Alaska, on the other. Such operations consist of two kinds of service, one seasonal and the other scheduled. The seasonal service is operated during the summer months to and from the seasonal areas of Alaska, namely: Bristol Bay, Nome, Kotzebue and Bering Sea. This service includes the transportation of cannery supplies northbound and canned salmon southbound. The scheduled service is operated year-round to all other areas of Alaska.

Northern Commercial serves ports and places along the Yukon River, Alaska, as a common carrier by water in conjunction with the seasonal service of Alaska Steam.

Both petitioners are subject to the regulatory jurisdiction of the Commission. On December 18, 1961, Alaska Steam filed with the Commission tariff schedules providing percentage increases in the rates of commodities moving principally, but not exclusively, in the seasonal service. The rate increases, which were intended to become effective on January 18, 1962, were twenty percent on cannery supplies, consisting of cans, cartons and salt, and ten percent on other commodities. These increased rates will be referred to herein as the "company rates."

Pursuant to its statutory powers, the Commission suspended these rates for four months pending investigation. The Commission simultaneously instituted an investigation in its Docket No. 969 entitled "Alaska Steamship Company —General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska," to determine whether the increased rates are just and reasonable.

Thereafter, Northern Commercial filed tariff schedules with the Commission naming increased rates and charges applying to its service along the Yukon River in conjunc-

tion with the seasonal service of Alaska Steam. The Commission suspended these rates for four months and instituted an investigation in its Docket No. 1067 entitled "Northern Commercial Co. River Lines—General Increase in Rates in the Yukon River Area of Alaska," to determine whether the increased rates are just and reasonable.

The investigations in Docket No. 969 and Docket No. 1067 were consolidated and hereinafter are called the consolidated dockets. By stipulation the parties agreed that the decision in Docket No. 969 would govern the rates and charges in Docket No. 1067. In view of this circumstance and in accordance with the plan followed by all parties in this review proceeding, we will hereinafter refer to Alaska Steam as if it were the only petitioner, and the company rates as if they were the only carrier-sponsored increases in question.

The rate investigation not having progressed to the stage where the Commission could enter a final order prior to the expiration of the four months suspension period, the company rates went into effect on May 18, 1962, and remain in effect to the present time.[1]

From December 4 through 15, 1962, a hearing examiner held hearings in the consolidated dockets.[2] The examiner issued an initial decision on May 31, 1963. He held that the company rates produced a rate of return of 19.40 percent on the rate base attributable to the seasonal opera-

[1] But for these review proceedings, the company rates would have been discounted by the summer of 1964 pursuant to one of the Commission orders here under review. After the review was instituted we entered an order, dated June 2, 1964, staying the Commission's orders pending the disposition of this petition for review.

[2] The State of Alaska, Port of Anchorage, Alaska, United States Department of the Interior, General Services Administration, and Puget Sound-Alaska Van Lines, a division of Puget Sound Tug and Barge Company, intervened in the proceedings before the examiner.

tion during the 1962 test year,[3] and that such rates are unjust and unreasonable to the extent that they produce a rate of return in excess of twelve percent on this rate base. The examiner further held that the company rates are just and reasonable "* * * to the extent they produce a rate of return up to and including 12 percent. * * *"

The Commission's hearing counsel, Alaska Steam, and two intervenors, State of Alaska and General Services Administration, filed exceptions. The Commission heard oral argument on the exceptions and rendered its decision on March 5, 1964.

The Commission held that a permissible rate of return for Alaska Steam would be ten percent on the rate base attributable to the seasonal service, and that during the test year the company rates had produced a rate of return of 19.75 percent on that rate base. The Commission ordered Alaska Steam to submit, within thirty days, amended tariff schedules showing rates which would produce no more than a ten percent return on the seasonal service.

On April 1, 1964, Alaska Steam petitioned the Commission for a rehearing. In this petition the company sought a reopening of the investigation to receive evidence of the actual results of the seasonal service for 1962 and 1963. In addition, Alaska Steam asserted that the company rates were in compliance with the March 5, 1964 order as actual results for 1962 and 1963 showed that they were not actually producing a rate of return in excess of ten percent. In its petition for rehearing Alaska Steam stated that "* * * if revised tariff schedules were to be filed, consistent with the Commission's findings and conclusions, then based on 1963 operations, Respondents would

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[3] Operating data for November and December, 1962, were not available prior to the conclusion of the hearing before the examiner. The 1962 test year therefore means the twelve consecutive months commencing with November, 1961.

find it necessary to *increase* the present seasonal rates an additional 8.082%. * * *" (Emphasis in original.)

By order dated May 12, 1964, the Commission denied the petition for rehearing. In response to Alaska Steam's assertion that the company rates were lawful under the Commission order, when viewed in the light of actual operating results in 1962 and 1963, the Commission stated that the company had misconceived the intent of the original order. That intent, the Commission stated in its May 12, 1964 order, was that Alaska Steam would file amended tariffs that would set forth rates based on a ten percent rate of return in the seasonal operation using the figures tested during the proceeding.

The Commission added, as a part of its order of May 12, 1964, findings that on the basis of the record in these proceedings the company rates are unjust and unreasonable and that maximum fair and reasonable increases over the level of rates in effect prior to the company rates would be the lesser percentage increases specified in the May 12, 1964 order.

Alaska Steam was given fifteen days within which to file amended tariff schedules giving effect to this finding as to appropriate rate increases.[4] Instead of doing so it filed

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[4] The Commission order of May 12, 1964, also contains this provision:

> "Although in the absence of suits for reparations pursuant to section 22, Shipping Act, 1916, we have no power to order Alaska Steam to repay to shippers charges in excess of those we find fair and reasonable, we can require that the amount realized from the unlawful portion of the increase 'be utilized for the benefit of the class who paid it. * * *'[1] [[1] Bebchick v. Public Utilities Commission, 115 U.S. App. D.C. 216, 318 F. 2d 187, 203 (D.C. Cir. 1963).] While in this case we do not have a record which is adequate to base a determination of how the excessive revenue can *now* be returned to the public, we will consider such revenue in determining the reasonableness of any future increases in the rates in the seasonal Alaska trade." (Emphasis in original.)

this petition to review both the March 5, 1964 decision and the order of May 12, 1964.

Alaska Steam contends that the Commission should have tested the company rates by the results of the overall Alaska operations rather than of the seasonal operations and that, so tested, the company rates are just and reasonable.

The Commission agreed with the hearing examiner that the reasonableness of the company rates should be tested by the results of the seasonal service and not by the results of the overall Alaska operations. In order to accomplish this it was necessary to construct a partial rate base attributable to the seasonal service,[5] and to allocate revenues and expenses for the 1962 test year as between scheduled and seasonal service.

The selection of a method or formula for computing permissible rates is for the Commission, unless its action is arbitrary. Government of Guam v. Federal Maritime Commission, 117 U.S. App.D.C. 296, 329 F.2d 251, 253-254. In determining whether the selection of a particular method or formula represents arbitrary action, courts look to the reasons which the Commission itself gave for such action, *post hoc* rationalizations for agency action being unacceptable. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167-168, 83 S.Ct. 239, 9 L.Ed.2d 207. If the Commission's decision of March 5, 1964, discloses a rational basis for testing the company rates by the results

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[5] Alaska Steam employs fourteen vessels in the overall operation of which seven are employed principally but not exclusively in the scheduled service and seven are employed principally but not exclusively in the seasonal service. Valuing the vessels and other property attributed to the seasonal operation in accordance with a prudent investment standard which utilized net book value, and adding a figure for working capital, the hearing examiner arrived at a rate base on the seasonal operation of $1,552,816. The Commission accepted this figure.

of the seasonal operation, its action in doing so is not arbitrary.[6]

The Commission's rationale in using the results of a separated seasonal rate base, as set forth in its decision of March 5, 1964, is quoted in the margin.[7] Challenging this line of reasoning, Alaska Steam argues that it is predicated on the erroneous assumptions that the scheduled service was operated at a loss, and that Alaska Steam enjoys a virtual monopoly in its seasonal operation while in its scheduled service the company faces keen competition. The company also argues that there is no other factual or legal justification or rationale supporting such action, but on the contrary, the facts negate such a separation.[8]

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[6] See Eustace v. Day, 114 U.S. App. D.C. 242, 314 F. 2d 247, equating arbitrariness with a lack of a rational basis for the action taken.

[7] "The increases filed by Alaska Steam apply to commodities moving principally in the 'seasonal trade.' In this trade Alaska Steam enjoys a virtual monopoly, while in its 'scheduled trade' it faces keen competition. The record shows that Alaska Steam has reduced its rates in the scheduled trade. Alaska Steam has put forth no convincing rationale as to why we should measure the increases here by the results of the carrier's overall operations. To do so would, in our opinion, allow the carrier to offset losses in the competitive trades with profits from the trade in which it presently enjoys a virtual monopoly. Shippers in the seasonal trade are dependent upon Alaska Steam's service. We think it would be unfair to saddle such captive shippers with the burden of the carrier's losses resulting from operations in the scheduled trade. The separation of services and construction of a partial rate base, while perhaps subject to some infirmities regarding exactitude of allocations, is the fairest method of testing these increases."

[8] In this connection Alaska Steam calls attention to the facts that one management supervises both the scheduled service and seasonal service, and that common headquarters and facilities are used in Seattle. Alaska Steam also asserts that the scheduled service is the backbone of the company's operations and that, absent the scheduled service, there could be no seasonal service.

The question of whether the scheduled service operated at a loss in the test year is discussed at a later point in the opinion in connection with another issue. For present purposes we shall assume, as Alaska Steam contends, that it did not operate at a loss during that year. But even under the company's computation, the gross profits on the scheduled service were only $74,655 in the test year, as compared to a gross profit of $361,484 on the seasonal service.

The theory underlying the Commission's quoted rationale is as valid where, as here, the profit on the scheduled service is minimal when compared to the seasonal service, as where the scheduled service is operated at an actual loss. In either case, the effect of rate increases mainly confined to the seasonal service, justified as necessary to provide a reasonable rate of return on the overall operation, is to subsidize the scheduled service at the expense of the seasonal service.

Alaska Steam points out that anyone willing to risk substantial loss and to be limited by regulation as to earnings is free to enter the seasonal trade. The company also notes that some seasonal service is rendered by others and that no rate-payer, shipper or other person using the seasonal service appeared and protested the company rates or testified to being "captive shippers." Therefore, Alaska Steam argues, the Commission should not have tested the company rates by the results of the seasonal operation on the assumption, as stated in the quoted Commission statement, that Alaska Steam has a "virtual monopoly" in the seasonal service and that those using that service are "captive shippers."

Granting the right of others to enter the seasonal service, not questioned by the Commission, the fact is that Alaska Steam carries from ninety-five to ninety-seven percent of the total salmon packed from ports served by the seasonal vessels on the Alaska Peninsula, Bristol Bay and the Arctic.

In the light of that economic fact it was not inappropriate to refer to the company's seasonal service as a "virtual monopoly," and to those using that service as "captive shippers."

The significance of this characterziation lies in the fact that, since Alaska Steam ran little risk of losing freight by increasing rates on seasonal cargo, there was the danger that seasonal shippers might be compelled to produce a disproportionate share of the necessary revenue needed to sustain the overall operation. If, on the other hand, the rates to be paid by the seasonal shippers must be tested by that operation alone, this danger would not be present.

The preceding discussion also demonstrates that importance should be attached to the fact that the increases filed by Alaska Steam apply to commodities moving principally in the seasonal trade.[9] The Commission took this consideration into account, thereby implying that it held the view that if Alaska Steam needed rate increases to sustain its overall operation, it should not have limited its rate increases largely to the seasonal service.

Considering together all factors upon which the Commission relied, we think it is established that the Commission had a rational basis for testing the reasonableness of the company rates against the seasonal operation alone. Its action in doing so is therefore not arbitrary.

Alaska Steam next argues that, even testing the reasonableness of the company rates by the seasonal service alone, such rates are just and reasonable and the Commission's determination to the contrary resulted from arbitrary

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[9] According to the report of the examiner, Alaska Steam's estimated revenues attributable to the rate increases it put into effect total $396,412, $37,178 from seasonal cargoes and salmon and cannery supplies carried by scheduled vessels and $359,234 from the same type of cargo carried by the seasonal vessels.

action in four particulars. Each of these asserted instances of arbitrary action is discussed below.

One of these, the company urges, was the action represented by the Commission's method of computing federal income taxes, to be deducted from gross profit in the test year on the seasonal service produced by the company rates, in determining net profit.[10]

The Commission found the gross profit of the seasonal service produced at the company rates to be $361,484 for the test year. The Commission, however, did not compute federal income tax on the seasonal service on the basis of this gross profit figure. Instead, it computed the tax on the $160,064 gross profit figure on the overall Alaska Steam operation for the test year, as shown in the company's exhibit 3-B-5, introduced during the hearing before the examiner.

In arriving at its gross profit figure on the overall operation for the test year at the company rates, the company projected a gross profit of $281,182 on the seasonal operation, and losses of $97,970 on the scheduled operation and $23,148 on the offshore, offseason operation. The federal income tax derived by the Commission which used the $160,064 gross profit figure was $77,226, which, obviously, is substantially below a theoretical fifty-two percent on the $361,484 gross profit on the seasonal operation as found by the Commission.

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[10] To conform to terminology used by the parties, the term "gross profit" is used to mean annual revenue less those items of expenses allowed by the Commission in determining gross profit before income taxes. The term "net profit" is used to mean gross profits less income taxes. The Commission had to determine net profit in the test year on the seasonal service, produced by the company rates, in order to arrive at an estimated rate of return for that year on the property devoted to the seasonal service under the company rates.

If it were true that, using the same methods employed by the Commission in projecting gross profit on the seasonal service, the scheduled service would show a loss in the test year, we do not believe that it would be arbitrary action for the Commission to take that into account in computing federal income tax on the seasonal operation. Under this hypothesis the federal income tax attributed to the seasonal service for the purpose of computing net profit would be less than a theoretical fifty-two percent on the Commission's gross profit figure of $361,484. But there would be a rational basis for using that decreased percentage since, otherwise, the seasonal operation would be charged with an income tax burden which, under the Commission's method of computing gross profit, the company would not bear.

But, as the Commission knew, the company's projection of a $97,970 loss on the scheduled service in the test year, as shown in its exhibit 3-B-5 utilized, in one particular, a substantially different method of determining gross profit than that used by the Commission in dealing with the seasonal operation.

In that exhibit, the company based annual depreciation expense on estimated useful lives of the vessels of twenty years from date of construction, with the exception of two more recently-acquired vessels which the company depreciated on the basis of a twenty-five-year life. This was in conformity with Alaska Steam's position throughout the proceedings that this was the proper basis of depreciation.

But the examiner, giving effect to a determination made by the Commission on April 30, 1963, in its Docket No. 881, General Increases in Alaskan Rates and Charges, 7 F.M.C. 563, 577-578 (1963), determined that:

> "* * * the useful life period of all of the vessels owned by Alaska Steam, used in the Alaskan trade, is found to be 25 years."

The Commission concurred in this determination and accordingly decreased the annual depreciation claimed by Alaska Steam for vessels employed in the seasonal trade in the test year, from $158,627, as claimed by the company, to $108,933. This, of course, had the tendency to maximize gross profit on the seasonal operation for the test year. But neither the examiner nor the Commission made a like adjustment in the company's exhibit 3-B-5, when they chose to use the overall gross profit for the test year, as projected therein, in computing federal income taxes on the seasonal service.

Alaska Steam advises us, and the Commission does not dispute this, that had a like adjustment been made in the depreciation figures in exhibit 3-B-5, depreciation on the scheduled operation would have been reduced from $445,933 to $255,715. This decrease in depreciation would have more than offset the $97,970 loss on the scheduled operation as projected in exhibit 3-B-5 and would have removed any basis for calculating federal income tax on the seasonal operation on the assumption that gross profit on that operation had been minimized by a loss on the scheduled service.

Without undertaking computations of our own it is quite evident that the 19.75% rate of return on the seasonal service at the company rates for the test year was substantially higher than it would have been had the Commission, in determining federal income tax, applied a hypothetical fifty-two percent rate of return to the $361,484 seasonal gross profit figure fixed by the Commission.

In our view, the Commission's determination to compute federal income tax on the assumption that the company lost $97,970 on the scheduled service in the test year, notwithstanding the fact that, applying the Commission's depreciation formula, there was no such loss, represents arbitrary action requiring a remand for further proceedings.

The Commission also acted arbitrarily, Alaska Steam asserts, with regard to the manner in which it allocated to the seasonal service a part of the administrative and general expense of the corporation in the test year.

The overall administrative and general expense incurred by the company during the test year was $1,625,330. Alaska Steam proposed to allocate a portion of this expense to the seasonal service on the basis of actual vessel days, in accordance with the Maritime Administration's General Order No. 60, 46 C.F.R. § 299.48(d). This General Order provides for the method of allocating administrative and general expense between the chartered and owned vessels of Alaska Steam to determine the charter hire payable under the provisions of the charter. Three of the vessels operated by Alaska Steam in the seasonal service are chartered from the Maritime Administration.

On this basis $410,444 of the administrative and general expense would have been allocated to the seasonal operation. The Commission, however, allocated this expense in the proportion that the total vessel operating expense of each service bears to the total vessel operating expense. Accordingly the Commission allocated $384,228 to the seasonal service, or $26,216 less than the company allocation. Alaska Steam asserts that had its method of allocation been followed, this one adjustment would have reduced the rate of return on the seasonal service for the test year from 19.75 percent as found by the Commission, to less than 12.3 percent.

The company argues that the allocation method established by the Maritime Administration is at least prima facie evidence of the proper method of allocation, that there is no evidence in the record to support any other method of allocation, that the Commission decision does not contain findings sufficient to support the method of allocation which it used, and that certain findings made by

the Commission tend to support Alaska Steam's allocation method.[11] In view of these considerations, Alaska Steam argues, the Commission acted arbitrarily in the matter of allocating a portion of the overall administrative and general expense to the seasonal operation.

In establishing its allocation method the Maritime Administration is engaged in determining excess charter hire. In formulating its allocation method, the Commission is engaged in economic regulation. In view of the disparity of objectives we do not believe that, in a rate case before the Commission, the Maritime Administration's allocation method can be regarded as prima facie evidence of the proper method. It is a factor to be considered, and nothing more.

Perhaps, as Alaska Steam asserts, the record does not contain testimony or exhibits tending to support the allocation method adopted by the Commission, as preferable to that proposed by the company. But the examiner and Commission were entitled to, and did, take official notice of the allocation method utilized by the Commission in General Increase in Rates (1961), 7 F.M.C. 260, at 288 (1962), referred to herein as the Hawaiian case.

In that case an allocation between passenger service and freight service was necessary. The Commission chose to allocate expenses between the two services as it has done here, in preference to a revenue prorate method of allocating expense. While the Commission was not there called upon to reject the Maritime Administration's allocation method, it did determine that an allocation of Administrative and general expenses on the basis of comparative

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[11] Alaska Steam here refers particularly to a statement in the Commission decision consisting of the first three sentences quoted in note 20, infra.

operating expenses of the two services, was appropriate for rate-making purposes.[12]

It is true that the Commission's determination, in the Hawaiian case, as to the appropriate allocation method to be applied, is not necessarily controlling here. Whatever allocation method has been found to be suitable in other rate cases, it is always open to a carrier to show that, under the facts of its case, that method would not be equitable.

The company refers to the Commission findings referred to in note 11, as demonstrating that the Commission's allocation method works out inequitably in this case. These findings have some tendency in that direction notwithstanding the fact that they were made with particular reference to the matter of working capital. But we are unable to say on this record that still greater inequities from the public point of view, or that other counterbalancing disadvantages such as those associated with the complexity of the Maritime Administration formula, might not have inhered in accepting, for rate-making purposes the latter's allocation method.

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[12] In explanation of the allocation method there followed, the Commission stated at page 288 of its decision in the Hawaiian case;

> "Where direct allocations are impossible or impracticable, expenses should be allocated between the passenger and freight services on the basis of the relation that the expenses incurred in the passenger and freight operations separately bear to the total expenses incurred in the operation of both. Administrative expenses should follow the expenses to which they relate. If revenues were used as a basis of allocating expenses, the increase in revenue resulting from a freight rate increase would result in an increased allocation of expenses. A rate increase might be used as the basis for justifying a further increase in rates."

The Commission made a considered choice between the two methods.[18] In our view, the reasons which it gave for choosing the prorating of operating expenses method of allocating administrative and general expenses, are adequate when measured by the standards of adequacy of such findings announced in Government of Guam v. Federal Maritime Commission, 117 U.S.App.D.C. 296, 329 F.2d 251, 254-256. The Commission's choice of the allocation method does not represent arbitrary action.

Alaska Steam contends that the Commission acted arbitrarily in determining the permissible rate of return on the property devoted to the seasonal service.

Alaska Steam produced testimony by one witness to the effect that the company would require a rate of return of twenty to twenty-five percent to prevent attrition of capital. No other evidence was offered. The examiner found that while the rate of return needed cannot be determined on this record with exactitude, in order to give effect to the applicable principles in establishing just and reasonable rates, a "reasonable maximum" rate of return for Alaska Steam in its seasonal service is twelve percent. The

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[18] After noting that the allocation method which it adopted followed the earlier precedent set in the Hawaiian case, and that the Maritime Administration's method involves a "complex formula" relating to excess charter hire, the Commission stated, in its report:

> "• • • since administrative and general expenses are a mixture of salaries and expenses that pertain to the over-all management and operation of Alaska Steam, logical reasoning dictates that their allocation should follow those expenses (i.e. vessel operating expenses) that management must control to profitably operate the business. Under the circumstances, we believe that the Examiner's allocation was fair and equitable. The very fact that these expenses are being allocated means that exactitude is impossible, and Alaska Steam has not shown on the record that the Examiner's allocation is inequitable or unfair."

examiner therefore found and concluded that the company rates are unjust and unreasonable to the extent that they produce a rate of return in excess of twelve percent.

In the subsequent proceedings before the Commission, the latter disagreed with the examiner's finding that "a reasonable maximum rate of return" should be set in this case, holding that it was unnecessary for the Commission to bind itself by setting a maximum rate of return. As to the actual rate of return to be allowed, the Commission also disagreed with the examiner, finding that the company rates are unjust and unreasonable to the extent that they allow Alaska Steam a rate of return in its seasonal service in excess of ten percent

There is no disagreement between the parties as to the principles to be applied in fixing an appropriate rate of return for rate-making purposes.[14] The company argues that the testimony which it produced gave effect to these

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[14] In stating these criteria the Commission said in its report:

"The criteria to be employed in a determination of a rate of return are well settled. In Bluefield [Water Works & Imp.] Co. v. Public Service Commission, 262 U.S. 679, at 693 [43 S. Ct. 675, 67 L. Ed. 1176] (1923) the Court said: 'The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.' And in Power [Federal] Commission v. Hope [Natural] Gas Company, 320 U.S. 591, at 603 [64 S. Ct. 281, 88 L. Ed. 333], the Court stated: 'The rate-making process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests *. * * From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock.'"

criteria and is consonant with the principles applied by the Commission in the Hawaiian case. Moreover, the company contends, the Commission determination that the rate of return on the seasonal service should not exceed ten percent is not supported by findings, based on testimony, that this is a fair and reasonable rate of return.

In rejecting the testimony of the company expert as to the appropriate rate of return, the Commission expressed the view that this witness did not "* * * take into consideration the realities of the situation." Explaining what it meant by this, the Commission pointed out that Alaska Steam is a closely-held Seattle-based corporation which does not go to the public for capital. All of the other companies referred to by the company expert for comparative purposes were publicly owned, and only one of them was based in Seattle.

In discussing the question of rate of return the Commission also found that the seasonal operations of Alaska Steam "* * * have perhaps a higher degree of risk than other steamship operations. But the agency also noted that the company occupies a "monopolistic" position in the seasonal trade, the effect of which is to minimize the greater business risk resulting from the seasonal character of the operation.[15]

We do not find in these reasons for rejecting the rate-of-return opinion of the company expert, the indicia of arbitrary action.

In the Hawaiian case the Commission found rates of return of 8.32 percent for 1960 and 10.59 percent for 1961

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[15] Apart from the business risk, the Commission stated that it was unconvinced that the physical hazards of the seasonal operation are any greater or should be given more weight than they are in any other trade.

not to be excessive in the Hawaiian trade. In that case the Commission determined the lawfulness of proposed Pacific coast-Hawaiian rates upon the results of operations by Matson Navigation Company (Matson), which carried from eighty-eight to 91.3 percent of the cargo. The Commission's finding that the rate of return percentages referred to above would not be excessive for Matson in the Hawaiian trade was based, in part, on the agency's view that Matson, " * * * is also subject to competition by other carriers who are free to enter the trade, * * *" Alaska Steam asserts that the same facts are true as to its seasonal operation, yet the Commission, departing from the course it followed in the Hawaiian case, held that "* * * risk to capital is reduced by Alaska Steam's monopolistic position in the trade."

On most of the seasonal operation, as heretofore noted, Alaska Steam carries from ninety-five to ninety-seven percent of the salmon pack, which is the principal cargo. It is therefore experiencing substantially less competition than that which confronts Matson in the Hawaiian trade. Yet the Commission has allowed nearly as large a rate of return on the seasonal operation (ten percent) as it did on the Hawaiian trade for 1961 (10.59 percent).

The basic principles to be applied in determining the proper rate of return do not vary from case to case. But the differing factual backgrounds of each case are usually such that the particular rate of return found reasonable in one case is not a reliable guide of what it should be in another. We are not convinced that the Commission's determination as to this in the case now before us so substantially and unjustifiably departs from what it did in the Hawaiian case, that arbitrary action is indicated.

In Docket No. 881, General Increases in Alaskan Rates and Charges, 7 F.M.C. 563 (1963), the Commission in testing a ten percent rate increase applicable alike to Alaska

Steam's scheduled and seasonal service, allowed a rate of return of 9.07 percent on the overall operations. The company correctly points out that there is nothing in that decision to indicate that the Commission intended to fix a maximum allowable rate of return. The Commission has not held otherwise here, having expressly rejected the examiner's finding that a reasonable maximum rate of return should be fixed. But the actual rate of return of ten percent on the seasonal operation, against which the Commission found that the reasonableness of company rates should be tested, substantially exceeds the actual rate of return applied in General Increases in Alaskan Rates and Charges.

We hold that the Commission did not act arbitrarily in dealing with the question of rate of return.

The fourth and final respect in which the Commission acted arbitrarily in testing the reasonableness of the company rates by the seasonal service, Alaska Steam asserts, is in its determination of the working capital requirement of the company for inclusion in its seasonal rate base.

At the hearing before the examiner, two witnesses called by the company testified as to the overall working capital requirement of Alaska Steam. One expressed the opinion that the overall working capital requirement was not less than $3,000,000. The other gave a minimum figure of $2,800,000. Allocated as between scheduled and seasonal service the lesser of these sums would have established $661,920 as the working capital on the seasonal service. The examiner, however, allowed only $453,090 for working capital on the seasonal service, and the Commission upheld this determination.

On this review, Alaska Steam argues that the Commission erred in not accepting the testimony of the two company witnesses as to required working capital, pointing out that there is no other evidence in the record bear-

ing upon this matter. The testimony of these two witnesses is summarized in the margin.[16]

The Commission rejected the figures provided by these witnesses on the ground that they were, in essence, based on the difference between current assets and liabilities

[16] One of these witnesses was William Paul McCarthy, auditor of Alaska Steam. He testified on direct examination that, based on his many years of experience with the company, the "absolute minimum" working capital requirement for the overall operation was not less than two million dollars, and that this would not include any allowance for such contingencies as major strikes, close-downs, or marine casualties. Adding what he regarded as a fair and reasonable allowance for such contingencies McCarthy expressed the opinion that the overall working capital should not be less than three million dollars. On cross-examination this witness stated that his two million dollar figure represents the excess of current assets over current liabilities. According to the company's exhibit 2-A-4, overall total current assets on December 31, 1961, were $3,102,979, and total current liabilities were $1,062,340.

The company's other witness on the question of working capital was R. Orville Dresback, Alaska Steam's independent certified public accountant. On direct examination, Dresback expressed the opinion that the proper overall working capital requirement of the company for the tax year was $2,800,000. He testified that this sum was composed of two items. The first, in the amount of $1,800,000, was the approximate amount of the company's excess of current assets over current liabilities, but excluding cash items, in August, 1961, a month of maximum activity. The second was the required amount of cash for current operations and emergencies, which Dresback placed at one million dollars.

In arriving at this cash figure, the witness took into account several factors. One of these was that the company, in August, 1961, had $980,086 of cash or its equivalent. Another was that this much cash would be needed if a two to one ratio of current assets to current liabilities was to be maintained, the witness recognizing, however, that this ratio is not a standard that can be used in all businesses. Other factors considered were that in August, September and October, 1961, the disbursements were at the rate of approximately $100,000 a day, and the need to have a cash fund to meet emergencies, such as those due to casualties and strikes.

on the company's balance sheet at a given time, plus approximately half as much again for contingencies, and that a figure so derived bears no relationship to the needs of the carrier.

We agree with the Commission that, whatever the justification may be for the working capital figures submitted by the company witnesses, they were essentially derived in the manner described. It would be purely coincidental if a figure so determined fairly represented the working capital requirements of a carrier or utility. As indicated by a generally accepted definition of working capital set out in the margin, the excess of current assets over current liabilities, as such, has no relation to company needs, the latter being the controlling factor in determining working capital.[17]

The company witnesses expressed the view that the figures submitted by them represented the working capital needs of Alaska Steam. No other witness expressed a different view. But while the financial and operating data of a carrier is subject to factual proof, the determination of its prospective working capital needs necessarily brings into play judgment factors lying in the realm of opinion.

The company witnesses were expressing informed opinions. In rejecting those opinions the Commission, also informed as to the relevant financial and operating facts, and in addition having expertise in the economic regulation

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[17] "Working capital, in the technical sense in which it is here employed, does not include the total liquid funds with which the business is conducted. It is not the property which the business *has:* that is, it is not the excess of current assets over current liabilities. Working capital, rather, is an allowance for the sum which the company *needs to supply from its own funds* for the purpose of enabling it to meet its current obligations as they arise and to operate economically and efficiently." (Emphasis in original) Barnes, Economics of Public Utility Regulations, 495 (1942).

of steamship companies, generally, expressed a contrary opinion. We cannot say, on this record, that the Commission acted arbitrarily because it did not give up its own opinion and accept that of the company witnesses.

Alaska Steam also makes a general attack upon the method utilized by the examiner and Commission in arriving at a seasonal working capital figure of $453,090.

This figure was computed according to the method prescribed in Maritime Administration General Order No. 31, 2d Revision, 46 C.F.R. § 286.3, Limitation (4), with insurance for a ninety-day period as required by that formula. Alaska Steam points out that this General Order was adopted for the purposes of applying the reserve and recapture provisions of Operating—Differential Subsidy Agreements (46 C.F.R. § 286.0), and that Alaska Steam does not operate under such subsidy agreements. A figure so determined, the company asserts, does not furnish a realistic measure of working capital used and needed for the purpose of serving the Alaskan trade.

The Commission did not utilize the General Order No. 31 formula on the supposition that Alaska Steam has a subsidy operation, but because that formula provides a tested way of deriving a figure representing the average voyage expenses for each vessel in the carrier's fleet. As early as its predecessor's 1957 decision in Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 5 F.M.B. 347, 350, 355, the Commission decided that this averaging of one-voyage expenses was an appropriate way to determine working capital requirements. See Government of Guam v. Federal Maritime Commission, 117 U.S.App.D.C. 296, 329 F.2d 251, 256.

The reasoning behind this theory was first expressed by the Commission in Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 7 F.M.C. 87, as quoted in

the margin.[18] This method of computing working capital has since been utilized by the Commission in General Increases in Alaskan Rates and Charges, 7 F.M.C. 563, at 582 (1963), and in the Hawaiian case, 7 F.M.C. 260, at 289 (1962).

However, the sum total of the voyage expense of one round trip for each vessel engaged in a particular steamship operation is not necessarily a fair gauge of the carrier's working capital needs in that operation. This was made clear in Government of Guam v. Federal Maritime Commission, 117 U.S.App.D.C. 296, 329 F.2d 251, 256-257, where working capital, so derived, amounted to forty-seven percent of the total rate base. Noting this "apparently incongruity,"[19] and holding that the Commission had made no findings and stated no conclusions to support its reason for applying the General Order No. 31 formula in that case in determining working capital, the court remanded the case for further proceedings.

The Commission decision in the case before us contains a rather full statement as to the various factors to be taken

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[18] "Working capital is required to meet the need which 'arises largely from the time lag between payment by the Company of its expenses and receipt by the Company of payments for service in respect of which the expenses were incurred.' Alabama-Tennessee Nat. Gas Co. v. Federal Power Commission, 203 F. 2d 494, at 498 (3 Cir. 1953). The Conference tariff specifies that freight must be prepaid. There would appear to be, therefore, no substantial lag between payment of expenses and receipt of revenues. To the extent there is any such lag, the working capital allowed by the Board—an amount approximately equal to one round voyage expense of each vessel in the service—is ample to take care of the carrier's needs (6 F.M.B. 14)."

[19] The court said, at page 256: "Working capital is rarely, if ever, so large a proportion of the funds committed to this type of enterprise." By comparison, the $453,090 working capital on the seasonal service allowed by the Commission in our case is approximately twenty-nine percent of the total rate base.

into consideration in determining the working capital requirements of Alaska Steam in its seasonal operation.[20] There are no specific findings or conclusions as to why a computation based on one round-trip voyage expense of each vessel would produce an adequate working capital figure taking into account the factors mentioned.

But the Commission was entitled to, and did, take official notice of its past decisions in which the same formula was applied, including the 1963 case involving the overall operations of Alaska Steam. General Increases in Alaskan Rates and Charges, 7 F.M.C. 563, at 582 (1963). Such notice carried with it the reasons relied upon in the past cases concerning the appropriateness of using this

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[20] The Commission stated:

> "In examining Alaska Steam's operations, it is readily apparent that the seasonal service requires working capital. Alaska Steam engages in substantial pre-season planning and in a certain amount of post-season wind-up of operations, finding it necessary to maintain a year-round staff to insure that the seasonal operations go smoothly. Alaska Steam has considerable inactive vessel expenses attributable to the seasonal service, and part of its administrative and general expenses attributable to the seasonal service must be met throughout the lay-up months and the slack months when little cargo is being carried. The record shows that Alaska Steam's carryings in the seasonal service for 1962 went from a low of 5,000 revenue tons in May to a high of 42,000 revenue tons in August.
>
> "In 1962, inactive vessel expenses allocated to the seasonal service were $250,013. Administrative and general expense allocated to the seasonal service was $384,229. Alaska Steam needs working capital to cover its inactive vessel expense, and the allowance for working capital should include provision for part of the $384,229 of administrative and general expense which will be incurred in off-months. The allowance for working capital must also take into account cash requirements during other periods when revenues do not cover costs such as costs resulting from periods of vessel lay-up due to accidents, periods of increased vessel operating costs prior to the effective date of increased rates, and periods of strike."

formula. The most comprehensive statement of these reasons, contained in the decision in the Puerto Rico case, is quoted in note 18.

We do not find in the record any factual basis for finding that a working capital formula appropriate for Alaska Steam's overall operations, is not appropriate for its seasonal operation. There is, indeed, some reason for believing that this formula tends to produce a more liberal figure for the seasonal working capital than for overall working capital, since the seasonal vessels are in actual operation only seven months of the year. At the examiner's hearing, the agency's hearing counsel advanced this as a reason for reducing the $453,090 figure to seven-twelfths of that amount, or $264,287. But the examiner and the Commission rejected that suggestion.

Absent a more direct and specific factual attack upon the adequacy of the $453,090 working capital figure the Commission allowed for the seasonal operation, we conclude that it is based upon adequate findings and a sufficient statement of reasons, and that the Commission did not act arbitrarily in this regard.

As stated earlier in this opinion, the Commission, in its order of May 13, 1964, denying Alaska Steam's petition for rehearing, also ordered the company to file amended tariff schedules which would have the effect of reducing the percentage increases on the seasonal service under the company rates to substantially lower percentage increases. The percentage increases thus authorized were 3.6 percent (in lieu of ten percent) on general cargo to the seasonal areas of Alaska, 7.3 percent (in lieu of twenty percent) on salmon cannery cargo, and 3.6 percent (in lieu of ten percent) on southbound canned salmon products from all areas of Alaska. These maximum increased rates authorized by the Commission will be referred to herein as the "Commission rates."

The Commission does not, in this order or elsewhere, describe how it arrived at the Commission rates, but merely found that they are "fair and reasonable." The company contends that this deficiency renders this provision of the May 13, 1964 order invalid.

Presumably, the Commission rates are designed to produce a rate of return of ten percent on the seasonal rate base of $1,552,816. The company points out that this result could be obtained by a sufficient reduction in revenue to result in a gross profit which, if subject to no income taxes, would together with the net profit from related companies, produce the desired rate of return. The company believes that this is what was done.[21] But if this is true there is an error in the Commission's calculation for it would make no allowance for the fact that the gross profit on the seasonal operation resulting from the Commission rates would be subject to income taxes.

In order to review the question of whether the Commission rates involve such an error, or some other error, and are the product of arbitrary action it is necessary for us to know the basis on which they were computed, and the Commission's reasons for selecting that basis. The failure of the Commission to disclose that information in its order of May 13, 1964, makes it necessary to remand the proceedings for findings and conclusions on the matter.

Alaska Steam argues that the Commission acted arbitrarily in denying the motion to reopen the investigation to receive evidence of the actual results of the seasonal service for 1962 and 1963.

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[21] The company calculates that the gross profit of the seasonal service for the test period, based on the Commission rates, would be $131,680, and adding $23,461 net profit of related companies would produce a total net profit of $155,141, or within $140 of the amount required to produce a ten percent rate of return.

When that motion was made on April 1, 1964, while the proceeding was still pending before the Commission, the operating results for 1962 and 1963 were known and, the company states, were not in dispute. The company further asserts that the use of those figures instead of the 1962 test year figures in computing rate of return at the company rates on the seasonal service, according to the Commission's own formula, involved only a simple arithmetic computation.

The Commission points out, however, that no matter how simple such a computation might have been, it could not have been accomplished without remanding the proceeding to the examiner, with all of the attendant delays this would involve. The Commission argues that in the interest of bringing an end to the investigation and getting an agency rate order into effect, the Commission was warranted in denying the motion to reopen.

We need not decide whether there was an abuse of discretion in denying the motion to reopen, made on April 1, 1964, because, in our view, Alaska Steam in the remanded proceedings should be permitted to renew that motion in the light of circumstances as they now exist.[22]

Another year has passed since the motion to reopen was first made and, with it, the actual seasonal operating results for an additional calendar year, 1964, have become available. If it is of any significance who is responsible for that year's delay in obtaining an effective rate order, the Commission must, in view of the errors found in its decision and order, accept its share of the blame.

With the passage of each year, the 1962 test year becomes more and more vulnerable to the charge of staleness. It therefore has less and less to recommend it as a reliable

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[22] For the same reason Alaska Steam's pending motion in this court for leave to adduce additional evidence is denied without prejudice.

basis upon which to predicate a prospective rate order. Moreover, in April, 1964, time was to be saved by not reopening the proceeding to receive later operating figures. This may not now be a persuasive factor. Perhaps no substantial delay may be occasioned by a reopening now to receive actual operating figures inasmuch as the proceeding must in any event be reopened on the remand ordered herein.

We make these observations not to indicate that it would necessarily be an abuse of discretion for the Commission not to reopen the investigation to receive later operating figures. There may be considerations not drawn to our attention which would warrant such a denial. The circumstances adverted to above, however, are sufficient to indicate to us that Alaska Steam ought to have the opportunity to again move for a reopening to receive later operating figures to be utilized in arriving at a rate of return on the seasonal service computed according to the Commission formula approved herein. Nothing said above should be taken as indicating that the Commission is required to entertain a motion to reopen for any other purpose.

Alaska Steam contends that the decision and order contravene its rights under the Fifth Amendment. It is unnecessary to consider this contention at the present time. The remanded proceedings may result in a rate order which does not aggrieve Alaska Steam, in which event its constitutional argument will become moot.

The Commission decision of March 5, 1964, and the Commission order of May 12, 1964, are reversed for the reasons stated in this opinion, and the cause is remanded to the Commission for further proceedings.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 657

PACIFIC FAR EAST LINE, INC., PETITIONER

v.

THE GOVERNMENT OF GUAM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE GOVERNMENT OF GUAM IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Government of Guam has standing as an *aggrieved party,* pursuant to the provisions of the Review Act of 1950, 5 U.S.C. 1031 *et seq.,* to maintain an action for review of a Federal Maritime Commission order approving general increases in the rates for the carriage of ocean freight between the United States and Guam.

2. Whether the court below exceeded the bounds of proper judicial review of an administrative determination by remanding to the Federal Maritime Commission the question of working capital allowable in the carrier's rate base with a mandate to supply the

findings of fact and conclusions of law based thereon which support the ultimate finding on this issue.

STATUTES INVOLVED

In addition to the statutory provisions presented by petitioner (Pet. 2), respondent submits for the consideration of the Court, Section 10 of the Review Act of 1950, 64 Stat. 1132, 5 U.S.C. 1040. This provision is hereinafter set forth in the Appendix to this brief (Appendix, *infra*, p. 16).

STATEMENT

The proceeding below was originally instituted by the Federal Maritime Board, the predecessor in jurisdiction to the present Federal Maritime Commission, under Section 18 of the Shipping Act, 1916 (39 Stat. 735, as amended, 46 U.S.C. 817), and Section 3 of the Intercoastal Shipping Act, 1933 (47 Stat. 1426, as amended, 46 U.S.C. 845), as an investigation of the justness and reasonableness of successive general increases in freight rates over the previously effective rates of Pacific Far East Line, Inc. ("PFEL"), for ocean transportation of cargo between ports of the United States and Guam.

The Commission in its Report dated October 23, 1962, found these rate increases to be just and reasonable, and ordered the investigation discontinued. The Government of Guam thereupon petitioned the United States Court of Appeals for the District of Columbia Circuit for a review of the Commission's Order and Report. Thereafter, on January 23, 1964, that Court delivered its decision in Appeal No. 17488, *Government of Guam* v. *Federal Maritime Commission*, 329

F. 2d 251, affirming in part and remanding in part the Report of the Commission. In its decision, the court directed the Commission (1) to make further findings and conclusions regarding the allocation of administrative and general expenses between the carrier's two services and (2) to make findings and state conclusions supporting its ultimate determination of the working capital allowed in the rate base of PFEL.

On these issues the court observed that it was unable to discharge its judicial duty of review because of the failure of the Commission to make necessary findings.

In response to this mandate, the Commission issued its Notice of Reopening of Proceedings in Docket No. 901, and on June 10, 1964, heard oral arguments and received briefs on the two issues remanded by the court below. On June 8, 1965, the Federal Maritime Commission issued its Order and Report on Remand, which affirmed its prior decision and discontinued the proceedings.

The Government of Guam again petitioned the court below to review the Commission's Order and Report on Remand. By a decision rendered July 11, 1966, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's findings regarding the allocation of administrative and general expense, but again remanded to the Commission the issue of working capital properly allowable in the carrier's rate base. The Court found that the Commission's Report on Remand—like its original Report—failed to include findings of fact which would justify the conclusions necessary to support the Commission's ultimate decision of the question.

It is this decision of July 11, 1966, to which the petition for a writ of certiorari is directed. Neither the United States nor the Federal Maritime Commission has petitioned for certiorari.

REASONS FOR DENYING THE WRIT

1. THERE IS NO "CONFLICT" BETWEEN THE JUDICIAL CIRCUITS REGARDING THE MEASUREMENT OF WORKING CAPITAL ALLOWABLE IN A CARRIER'S RATE BASE FOR USE IN THE RATE OF RETURN DETERMINATION

Contrary to petitioner's contention, an objective reading of *Alaska Steamship Co.* v. *Federal Maritime Commission,* 344 F. 2d 810 (C.A. 9) (Pet. 44a), and the decision of the court below, *Government of Guam* v. *Federal Maritime Commission,* 365 F. 2d 515 (Pet. 33a), reveals neither conflict nor disagreement, but relative accord.

To relate the two decisions to the instant controversy, reference must be made to the opinion of the court below in its *first* judicial review of these proceedings, *Government of Guam* v. *Federal Maritime Commission,* 329 F. 2d 251 (Pet. 15a).

In that first review, the court below held that the selection of the methods and formulas for the computation of factors essential to rate making is for the administrative tribunal and not for the court; but the court clearly noted:

> However there is a judicial duty of review in these matters, and it is equally well established that the reviewing authority is entitled to know—indeed must know—the basic data and the whys and wherefores of the Commission's conclusions. [*Id.* at 255; Pet. 21a, 22a.]

Specifically, regarding the issue of working capital, the court below there pointed out that such an allowance in the rate base is not a doctrinaire entry, but *must be a realistic allowance both in respect to need and amount for the carrier and trade in question.* The court's remand to the Commission regarding the guidelines to be followed in the determination of this issue was set forth in clear and unambiguous language:

> For what purposes did *this* company need working capital, and how much did it need for those purposes?
>
> * * * * *
>
> We cannot tell from the data before us whether the amount thus included was or was not within the discretionary power of the Commission. The case must therefore be remanded in order that the Commission may make the findings and state the conclusions which resulted in the ultimate conclusion it reached on this point. [*Id.* at 257; Pet. 25a.]

The Ninth Circuit decision in *Alaska Steamship Co.* v. *Federal Maritime Commission, supra,* which petitioner relies upon as being "in conflict" with the opinion of the court below, was handed down during the period between the first and second judicial review of these proceedings by the court below.

The cited decision of the Ninth Circuit, so far as the issue of working capital is concerned, is not only in accord with the two decisions of the court below in the instant controversy, but, in addition, utilizes the opinion of the court below on the first review of these

proceedings as authority in its extended discussion of working capital.

In discussing the Commission's utilization there of the average round voyage expense formula for the calculation of working capital which is contended for by petitioner here, the Ninth Circuit recognized the basic rule that *the propriety of the application of that formula must necessarily depend on the facts pertaining to the particular carrier and trade under investigation.*

> However, the sum total of the voyage expense of one round trip for each vessel engaged in a particular steamship operation is not necessarily a fair gauge of the carrier's working capital needs in that operation. This was made clear in *Government of Guam* v. *Federal Maritime Commission*, 117 U.S. App. D.C. 296, 329 F. 2d 251, 256–257, where working capital, so derived, amounted to forty-seven percent of the total rate base. * * * [*Alaska Steamship Co.* v. *Federal Maritime Commission, supra*, 344 F. 2d at 824; Pet. 67a.]

In the light of this language, there can be no doubt that the Ninth Circuit recognized that the calculation of working capital pursuant to the questioned formula is not a matter of administrative expertise divorced from a factual record showing it to be appropriate in need and amount for the particular trade and carrier whose tariff rates are under investigation. The vice of petitioner's position is that it believes a formula "in the air," unsupported by facts of record, is enough.

Although the Commission had made no specific findings or conclusions regarding the appropriateness of

the application of the average round voyage expense formula to the Alaskan trade, the Ninth Circuit concluded that the Commission's use of the formula might stand in view of previous Commission decisions in which the same formula was applied to that very trade ["including the 1963 case involving the overall operations of Alaska Steam. General Increases in Alaskan Rates and Charges, 7 F.M.C. 563, at 582 (1963)"]. (*Id.* at 825, Pet. 68a.)

The court simply gave weight to the Commission's prior determination on the record of an investigation of freight rates of the same carrier in the same trade, that the calculation of working capital pursuant to the average round voyage expense formula was reasonable and appropriate *for that carrier and that trade.* In the instant controversy, there has been *no* prior determination by the Commission of the working capital necessary for Pacific Far East Line's operations in the domestic offshore Guam trade.

In the *Alaska Steamship* case, the Ninth Circuit concluded its discussion of working capital by stating that *absent a more direct and specific factual attack upon the adequacy of the working capital figure allowed by the Commission, it would uphold this calculation.* The Government of Guam in the proceedings below has made just such a direct and specific factual attack upon the propriety of the application of this formula to the Guam trade. As stated by the court below:

> We do not mean to hold that the Commission must make detailed factual findings in respect to every item involved in any of the many

> complicated transactions which it must consider in the performance of its duties; but, when a factual item is seriously disputed, and especially in the event of a remand from a reviewing court, findings in sufficient detail to support the ultimate conclusion of the agency against the attack must be made by the agency. [*Government of Guam* v. *Federal Maritime Commission, supra,* 365 F. 2d at 520; Pet. 41a.]

Respondent submits that no "conflict" exists between the decision of the court below and the decision of the Ninth Circuit.

2. THE COURT BELOW DID NOT INVADE THE COMMISSION'S DOMAIN OF ADMINISTRATIVE EXPERTISE, BUT SIMPLY REQUIRED THE FACTS ON WHICH SUCH EXPERTISE WAS APPLIED TO BE STATED IN SUPPORTABLE FINDINGS

The petitioner suggests that the court below through "a barely disguised expression of disagreement with the findings of the Commission, based upon substantial evidence" has substituted its judgment for that of the agency "on matters within the area of administrative expertise" (Pet. 9, 11).

Here, as in *Burlington Truck Lines* v. *United States,* 371 U.S. 156:

> There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act[16] will not permit us to accept such adjudicatory practice. See *Siegel Co.* v. *Federal Trade Comm'n,* 327 U.S. 608, 613, 614. Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for admin-

istrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion." *New York* v. *United States,* 342 U.S. 882, 884 (dissenting opinion). "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *Federal Communications Comm'n* v. *RCA Communications, Inc.,* 346 U.S. 86, 90. The Commission must exercise its discretion under § 207(a) within the bounds expressed by the standard of "public convenience and necessity." Compare *id.,* at 91. And for the courts to determine whether the agency *has* done so, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Interstate Commerce Comm'n* v. *J-T Transport Co.,* 368 U.S. 81, 93; *United States* v. *Carolina Carriers Corp.,* 315 U.S. 475, 488-489; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499, 511. * * * [371 U.S. at 167-168].

[15] Section 8(b), 5 U.S.C. § 1007(b), provides that all decisions shall "include a statement of * * * findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record."

The court below was not only justified in commenting, but was *required* to comment on the generalized rationalizations proffered by the commission on remand in response to the court's mandate to supply

the underlying findings of fact and conclusions which, in turn, supported its determination of the question remanded. Such judicial comment cannot in any manner be construed as a substitution of judgment by the reviewing Court.[1]

3. THE GOVERNMENT OF GUAM HAS STANDING TO SECURE JUDICIAL REVIEW OF THE COMMISSION'S DETERMINATION BOTH IN GUAM'S CAPACITY AS *PARENS PATRIAE* AND HER PROPRIETARY CAPACITY[2]

Petitioner states that Guam claims "no proprietary interest as a user of ocean transportation or otherwise" (Pet. 3) and contends that Guam lacks standing as *parens patriae* to seek judicial review of a Federal Maritime Commission order emanating from an investigatory proceeding under Section 18 of the Shipping Act, 1916, and Section 3 of the Intercoastal Shipping Act, 1933.

Petitioner misconceives Guam's capacity in these proceedings. Without question, the Government of

---

[1] The Commission has now acknowledged that there is no substantial evidence of record to support its findings. On October 25, 1966, it ordered the case reopened, stating in part: "A review of the record in this proceeding reveals that the findings which the Court of Appeals has required the Commission to make cannot be made on the basis of the present record." Federal Maritime Commission, Docket No. 901, *General Increases in Rates—Pacific-Atlantic/Guam Trade*, Order, October 25, 1966 (Appendix, *infra*, p. 21).

[2] There is a question whether this issue is timely presented by the petition for certiorari, filed more than ninety days after its resolution by the judgment entered on the first review proceedings in the case. See 329 F. 2d 251, 252–253. Cf. *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 212–213; *Federal Power Commision* v. *Idaho Power Co.*, 344 U.S. 17, 20.

Guam maintains its position in these procedings as *parens patriae* to the peoples of Guam; but contrary to petitioner's assertion, it is also a matter of record that the Government of Guam intervened in and sought review of these proceedings not only on behalf of the peoples of Guam, but to protect its own proprietary interest both as a shipper and consignee of ocean freight subject to the rates under investigation.

On September 7, 1960, the Government of Guam petitioned the Federal Maritime Board for leave to intervene in these proceedings. The petition to the Federal Maritime Board stated, *inter alia,* that the Government of Guam "has a *property, financial, and civil* interest in the proceeding * * *" (emphasis added; Appendix, *infra,* p. 18).

On December 19, 1962, the Government of Guam petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Order and Report of the Federal Maritime Commission in this investigation. This petition stated, *inter alia,* "the lawfulness of freight rates and charges is of vital concern to the *Government and people of Guam,* the economics of *whose* very existence is predicated on this ocean freight supply line to the United States" (emphasis added; Appendix, *infra,* p. 20).

Thus, the Government of Guam sought intervention and review both under its capacity of *parens patriae* of the peoples of Guam and in its *proprietary capacity* as a shipper and consignee of ocean freight.

The question of Guam's standing to seek judicial relief in either of the above capacities was put to rest by this Court in *Georgia* v. *Pennsylvania R.,* 324 U.S.

439. In this decision, this Court upheld the standing of the State of Georgia to seek judicial relief both in its proprietary capacity and in its capacity as *parens patriae* to the citizens of Georgia. This decision squarely held that a State may invoke the rights conferred by federal statutes (antitrust laws) in either of the above capacities. Regarding Georgia's judicial right to proceed under this Federal statute to protect the interest of the citizens of that State, this Court stated (p. 451):

> Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction.

In that case, this Court clearly distinguished the doctrine laid down in *Massachusetts* v. *Mellon,* 262 U.S. 447, and *Florida* v. *Mellon,* 273 U.S. 12, the cases upon which petitioner bases his attack on Guam's standing in the following language (324 U.S. at 445):

> It is said that the bill does not set forth a justiciable controversy within the rule of *Massachusetts* v. *Mellon,* 262 US 447, and

> *Florida* v. *Mellon*, 273 US 12. We take the other view, for we are of the opinion that Georgia as *parens patriae* and as proprietor of various institutions asserts a claim within judicial cognizance. The complaint of Georgia in those respects is not of a political or governmental character. There is involved no question of distribution of powers between the State and the national government as in *Massachusetts* v. *Mellon* and in *Florida* v. *Mellon*, *supra*. * * *

The principle established by this Court in *Georgia* v. *Pennsylvania R.*, *supra*, was followed by a three-judge federal court in *State of New York* v. *United States*, 65 F. Supp. 856 (N.D.N.Y.), affirmed, 331 U.S. 284. In the language of that court (65 F. Supp. at 872):

> First, there should be a brief allusion to the contention that the plaintiff States have no standing to sue as parens patriae but only as shippers and receivers of freight. This point has become more or less academic since there are states who are parties plaintiff who plainly may sue as freight shippers and consignees directly affected by the order. But all the States who are parties are political entities which are also regions or districts within the rate-making territories involved and they are directly affected as such and have an interest in behalf of their citizens and communities above and apart from the rights of any particular shipper or receiver of freight to a continuance of existing rates or the maintenance of others. This we think distinguishes such cases as *Oklahoma* v. *Atchison, T. & S.F.R.*, 220 U.S. 277,

286, 31 S. Ct. 434, 55 L. Ed. 465; *Sprunt & Son, Inc.* v. *United States,* 281 U.S. 249, 50 S. Ct. 315, 74 L. Ed. 832; and *Alabama Power Co.* v. *Ickes,* 302 U.S. 464, 58 S. Ct. 300, 82 L. Ed. 374, and *gives these States standing to sue as parens patriae to preserve or enhance the welfare of their citizens by securing to them the proper administration of federal laws under the principles applied in Georgia* v. *Pennsylvania R.,* 324 U.S. 439, 446-52, 65 S. Ct. 716, 89 L. Ed. 1051. [Emphasis added.]

Plainly, Guam as intervenor was a principal party in the proceedings before the Commission. Without doubt, as such party Guam is "aggrieved" by the Commission's Report on Remand. Nothing more was required by the Congress in creating the right to appellate review, the remedy which Guam invoked to be heard by the court below. Sec. 4, Review Act of 1950, 5 U.S.C. 1034 (Pet. 3a).

CONCLUSION

For the foregoing reasons, the within petition for a writ of certiorari should be denied.

Respectfully submitted.

HAROLD W. BURNETT,
Attorney General,
Territory of Guam.

EUGENE L. STEWART,
DONALD O. LINCOLN,
THOMAS L. DELANEY,
Attorneys for Respondent.

Of Counsel:
LINCOLN & STEWART.

The Solicitor General authorizes the filing of the foregoing brief.

THURGOOD MARSHALL,
Solicitor General.

DECEMBER 1966.

APPENDIX

Pertinent Provisions of the Review Act of 1950, 64 Stat. 1129, 1132, 5 U.S.C. 1040

Sec. 10. *Review in Supreme Court on certiorari or certification.* An order granting or denying an interlocutory injunction under section 1039(b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254(1) of Title 28: *Provided,* That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254(1) of Title 28: *Provided further,* That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254(3) of Title 28, regarding certification, and of section 2101(e) of Title 28, regarding stays, shall also apply to proceedings under this chapter.

(Served, September 20, 1960, Federal Maritime Board)

FEDERAL MARITIME BOARD

September 19, 1960

No. 901

GENERAL INCREASES IN RATES, PACIFIC-ATLANTIC GUAM TRADE

RULING ON PETITION TO INTERVENE

A petition to intervene herein having been filed by the Government of Guam, and good cause appearing, said petition is hereby granted.

Interveners are reminded that documents filed in this proceeding, such as motions, petitions, etc., must be served upon all parties of record, a list of whom are on file in the Board's Office of Hearing Examiners, Washington, D.C.

(S) C. B. GRAY.

PETITION OF THE GOVERNMENT OF GUAM FOR LEAVE TO INTERVENE

Comes now your Petitioner, the Government of Guam (hereinafter referred to as Petitioner), pursuant to Rule 5(n) of the Federal Maritime Board's Rules of Practice and Procedure and respectfully petitions the Federal Maritime Board (hereinafter referred to as Board) for Leave to Intervene in the above-captioned proceeding, and in support thereof represents and alleges as follows:

I

That the Government of Guam is the duly authorized agency responsible under the direction of the Secretary of the Interior for the administration of the affairs of the Island of Guam; and as such has a property, financial, and civil interest in the proceeding which will not be adequately represented by any other party to the proceeding.

II

That the subject matter in this proceeding involves, among other things, an investigation into the lawfulness of increased freight rates of the Carriers providing service in the Pacific-Atlantic/Guam trade route.

III

That the Government of Guam is vitally interested in trade between U.S. Pacific and Atlantic ports, on the one hand, and Guam, on the other hand; and the rates, fares, charges, rules and regulations of the Carriers have a direct bearing on the development of commerce between Guam and these United States ports.

IV

That Guam is vitally dependent to a great extent on adequate waterborne transportation services at just and reasonable rates and charges in order to provide for its existing population and commerce and to meet the reasonable needs of an expanding population and the continuing expansion in commerce.

V

That the participation of your Petitioner in this proceeding will assist the Board in the development

of a sound and adequate record and will not unduly broaden the issues nor delay this proceeding.

WHEREFORE, the Government of Guam respectfully requests leave to intervene and be treated as a party hereto with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at oral argument, if oral argument is granted.

Respectfully submitted.

GOVERNMENT OF GUAM

By (S) EUGENE L. STEWART,
Co-Counsel.

Dated at Washington, D.C., this 7th day of September 1960.

PETITION FOR REVIEW OF ORDER OF THE FEDERAL MARITIME COMMISSION

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

The Government of Guam, pursuant to the Review Act of 1950 (5 U.S.C. § 1031, *et seq.*) and Rule 38(a) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit, hereby petitions this Court for review of the Order and Report of the Federal Maritime Commission, dated October 23, 1962, in the proceeding, *General Increases in Rates—Pacific-Atlantic/Guam Trade,* Docket No. 901. A copy of the Order and Report is attached to this Petition.

I. Nature of the Proceedings

This proceedings was an investigation under Section 18 of the Shipping Act, 1916, 46 U.S.C. § 817, and Section 3 of the Intercoastal Shipping Act, 1933,

46 U.S.C. § 845, of the justness and reasonableness of successive general increases in freight rates between ports of the United States and Guam of 10 per cent and 20 per cent published by Pacific Far East Line (PFEL) in its tariffs PFEL Guam Tariff No. 2 (F.M.B.-F. No. 2) and PFEL Tariff No. 3 (F.M.B.-F. No. 3), and by American President Lines (APL) in its tariffs APL Pacific-Guam Tariff No. 5 (F.M.B.-F. No. 9), APL Atlantic Guam Tariff No. 3 (F.M.B.-F. No. 8), APL Pacific Guam Tariff No. 6 (F.M.B.-F. No. 11), and APL Atlantic-Guam Tariff No. 4 (F.M.B.-F. No. 10), which, after the maximum suspension permitted by law, became effective on April 30, 1960, and January 27, 1961, respectively.

The Report of the Commission found the rate increases to be just and reasonable, and its Order discontinued the investigation.

PFEL and APL are the only ocean transportation carriers providing freight service between ports in the United States and Guam. Guam is the most distant U.S. territory, being farther from the United States than Japan. The lawfulness of freight rates and charges is of vital concern to the Government and people of Guam, the economics of whose very existence is predicated on the ocean freight supply line to the United States.

The Government of Guam is aggrieved by the Commission's Order and Report finding the increased freight rates to be lawful.

II. Venue

The venue is in this Court pursuant to the provisions of 5 U.S.C. § 1033.

* * * * *

IV. Relief Requested

The Government of Guam requests this Court to review the Federal Maritime Commission's Order and Report of October 23, 1962; to set it aside; to remand this proceeding to the Federal Maritime Commission for the entry of an Order consistent with this Court's findings; and for such other and further relief as this Court may deem reasonable and proper.

Respectfully submitted,

GOVERNMENT OF GUAM
By (s) EUGENE L. STEWART
Its Attorney
Hume & Stewart

December 19, 1962.
[Certificate of Service].

(Served, October 25, 1966, Federal Maritime Commission)

FEDERAL MARITIME COMMISSION

Docket No. 901

GENERAL INCREASES IN RATES—PACIFIC-ATLANTIC/GUAM TRADE

ORDER

On July 11, 1966 the U.S. Court of Appeals for the District of Columbia Circuit remanded this proceeding for a second time to the Commission. In the first review proceeding, the Commission's Report and Order were affirmed in all respects with the exception of the Commission's disposition of working capital and administrative and general expense. In a Report on

Remand served on June 8, 1965, the Commission reaffirmed its previous allocations of working capital and administrative and general expense, having received additional briefs and heard oral argument. In its most recent opinion, the Court of Appeals found the treatment of the administrative and general expense item satisfactory, but it again remanded the working capital issue for supporting findings to justify the inclusion of an amount based on the Commission's formula in the rate base of Pacific Far East Line, the dominant carrier in the Guam trade.

A review of the record in this proceeding reveals that the findings which the Court of Appeals has required the Commission to make cannot be made on the basis of the present record. Therefore, additional evidence must be received. A hearing has been scheduled for November 30, 1966 in Docket Nos. 66–13 and 66–18, proceedings which involve rates in the Guam trade. Inasmuch as the parties in those consolidated proceedings and in Docket No. 901 are the same and the issue of working capital must also be determined in the new proceedings, the Commission is of the opinion that the issue of working capital in Docket No. 901 should be set down for hearing and determined at the same time as in Docket Nos. 66–13 and 66–18.

THEREFORE, IT IS ORDERED, That the issue of determination of working capital in Docket No. 901, pursuant to the instructions of the U.S. Court of Appeals for the District of Columbia Circuit in No. 19,574, be set down for hearing and consolidated with the proceedings in Docket Nos. 66–13 and 66–18.

By the Commission.

[SEAL] THOMAS LISI, *Secretary.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 657

PACIFIC FAR EAST LINE, INC., *Petitioner*

v.

THE GOVERNMENT OF GUAM, *Respondent*

REPLY TO THE BRIEF IN OPPOSITION

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REPLY TO THE BRIEF IN OPPOSITION

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1. Respondent's effort to harmonize the decision below with *Alaska S.S. Co.* v. *FMC*[1] emphasizes the conflict between them. In both cases the Commission had made substantially the same findings as to the carriers' working capital needs, namely, that working capital is necessary to cover cash requirements for various unpredictable events such as accidents, lay-ups, strikes, and the lag between cost increases and rate increases. In neither case had the Commission met the requirement that the court below did, but the Ninth Circuit did not, impose—that the findings state how many dollars were needed for each of these sev-

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[1] 344 F.2d 810, 823-25 (9th Cir. 1965).

eral contingencies, and the "sources" of these dollars. Instead, the Commission had relied on its experience in prior cases in the off-shore domestic trades that the round-voyage-expense formula expressed in Limitation (4) of General Order No. 31 produces a working capital limitation reflecting with sufficient accuracy the needs of the carriers in these trades. (The Commission regards these trades as similar, as they all involve regularly scheduled non-subsidized service from the mainland of the United States to the off-shore states, territories, and possessions).[2]

The Ninth Circuit held these findings adequate; the court below holds them inadequate—a square conflict. Respondent obfuscates the matter when it suggests (Br. in Opp., p. 7) that in the *Alaska S.S. Co.* case the Commission gave weight to findings which respondent implies had been made in an earlier investigation of Alaska Steamship Co.'s rates.[3] That earlier Alaskan investigation did not produce findings of the kind demanded by the court below in the present case; on the contrary, in the earlier investigation the Commission had merely made findings indistinguishable from those upheld by the Ninth Circuit in the recent *Alaska S.S. Co.* case and overturned by the court below in this case. Indeed, in the earlier Alaskan investigation the Commission had simply relied upon its similar findings in a still earlier case in the Puerto Rico trade. See *General Increase in Alaskan Rates and Charges, supra* n. 3, at 582. In both the *Alaska S.S. Co.* case and the present case the question was whether the Commission may rely upon find-

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[2] In the *Alaska S.S. Co.* case the Commission referred to the seasonality of the Alaska trade. But that is not a basis of distinction between the two cases, for the seasonality would have tended, if anything, as Alaska Steamship Company urged, to support a larger working capital than Limitation (4) permits; yet the Commission adhered to the formula.

[3] General Increase in Alaskan Rates and Charges, 7 F.M.C. 563 (1963).

ings of this character in invoking the round-voyage-expense formula.

2. a. Respondent's suggestion in a footnote (Br. in Opp., p. 10) that the petition is untimely as to Question 2 (relating to Guam's lack of standing to invoke the jurisdiction of the court below) is unfounded. This Court may now consider all substantial questions determined in the earlier stages of the litigation, including those disposed of by the court below in the first review proceeding. *Reece* v. *Georgia*, 350 U.S. 85, 87 (1956); *Urie* v. *Thompson*, 337 U.S. 163, 171-73 (1949). This rule was applied at the last term in *Consolo* v. *FMC*, 383 U.S. 607 (1966), where the Court decided, on certiorari to the court of appeals in a second review proceeding, questions as to the jurisdiction of that court to entertain an earlier review proceeding that had resulted in a remand to the Commission. That case is on all fours with this. The *Minneapolis-Honeywell* and *Idaho Power* cases cited by respondent concerned the time for filing a petition when the judgment of which review is sought has been or may have been modified; no modification of a judgment is involved in this case.

b. While conceding that its interest before the court of appeals was that of *parens patriae* to its constituents, respondent now asserts that it also appeared in some other capacity, characterized by it as "proprietary" (Br. in Opp., p. 11). There is neither a word of evidence nor an allegation in any pleading in the record that the respondent government of Guam ships or receives so much as a pound of cargo under the rates which it asked the Commission to investigate. Respondent therefore has no "proprietary capacity" in this case; its use of that phrase is merely an argumentative way of alleging (but not proving) that as a government it is affected financially by rates paid or borne by its constituents. That kind of effect is precisely the kind deemed inadequate to confer standing upon a governmental body or administrative agency in the prior decisions of this Court cited in the petition (pp. 11-15).

Conclusion

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel:
KOMINERS & FORT

December 21, 1966

Certificate of Service

I certify that I have served the foregoing Reply to the Brief in Opposition upon all parties of record by mailing copies to the Solicitor General, to the General Counsel of the Federal Maritime Commission, and to Eugene L. Stewart, Esquire, 1001 Connecticut Avenue, Washington, D. C., 20036, attorney for respondent, this 21st day of December, 1966.

MARK P. SCHLEFER